[redacted]

(32,836)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 384

HOWARD MOORE, PETITIONER,

vs.

THE CITY OF NAMPA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 5, 1927

[fols. 1-11]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

No. 1245. At Law

HOWARD MOORE, Plaintiff,

vs.

THE CITY OF NAMPA, a Municipal Corporation, Defendant

AMENDED COMPLAINT—Filed June 17, 1926

Plaintiff complains of defendant and alleges:

I

That plaintiff is a resident and citizen of the State of Colorado; that defendant is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Idaho and a resident and citizen of that state, and that a diversity of citizenship exists between plaintiff and defendant.

II

That the amount involved in this controversy exceeds the sum of three thousand dollars ($3,000.00), exclusive of interest and costs.

[fol. 12]

III

That under the provisions of the laws of the State of Idaho in force at all times mentioned in this complaint, the defendant, the City of Nampa, a municipal corporation, for the purpose of promoting the comfort, convenience, health and well being of said municipal corporation, had the power and authority to establish sewer districts in conformity with the requirements of the topography of the ground within said municipal corporation, and had the power and authority: (1) To construct in each of said districts a sewer system sufficient to provide adequate sanitary drainage and sewerage disposal for such district; (2) to provide for

the payment of the cost and expense of the construction of such sewer system by fixing and assessing the cost and expense thereof upon and against the lands in such districts in proportion to the benefits derived from such sewerage improvement; and (3) to anticipate the collection of such assessments by issuing obligations denominated Special Assessment Sewerage Improvement Bonds, to provide for the payment of the cost and expense of such improvement.

IV

That prior to the times hereinafter mentioned the Mayor and Council of said defendant city, in full conformity with the laws of the State of Idaho, created, organized and estab- [fol. 13] lished a local sewerage improvement district in said city known and called "Local Sewerage Improvement District No. 22," for the purpose of constructing a sewerage system therein.

V

That after the creation, organization and establishment of said sewerage improvement district, the Mayor and Council of said defendant city, by ordinances and other proceedings, caused sewerage improvements to be constructed in said district, and did, by Ordinance No. 350, adopted and approved on the 6th day of December, A. D. 1920, levy, confirm and ratify special assessments upon the property in said improvement district in the sum of one hundred eighteen thousand three hundred dollars ($118,300.00); that in anticipating of the collection of said assessments, and to provide for the payment of the cost and expense of such improvement, said ordinance authorized the execution and delivery of special assessment sewerage improvement bonds of said district in the sum of one hundred seventeen thousand dollars ($117,000.00), and provided that such bonds and the interest coupons thereto attached should be in substantially the following form, to-wit:

[fol. 14] United States of America, State of Idaho, City of Nampa

Special Assessment—Sewerage

Improvement Bond, District Number 22

No. —. $ —.

The City of Nampa, in the County of Canyon and State of Idaho, for value received, hereby acknowledges itself to be indebted and promises to pay to the bearer the sum of — dollars, in gold coin of the United States of America, or the equivalent thereof in lawful money, on the presentation and surrender of this obligation on or before the first day of January, A. D. 1931, with interest thereon from the date hereof until paid at the rate of seven per centum per annum, payable semi-annually, in like medium on the first day of January and the first day of July in each year, on the presentation and surrender of the proper coupon hereto attached, both principal and interest being payable at the office of the City Treasurer of the City of Nampa, Idaho, or at the Chase National Bank, in the City and State of New York, U. S. A., at the option of the holder.

This bond is one of a series issued for the payment of the cost and expense of the construction of a sewerage system in Local Sewerage Improvement District Number 22, in the [fol. 15] City of Nampa, Idaho, as authorized by Chapter 171 of the Idaho Compiled Statutes, 1919, and all other laws thereunto enabling, and in conformity with said law it is hereby recited that "the holder of any bond issued under the authority of this chapter shall have no claim therefor against the municipal corporation by which the same is issued, in any event, except for the collection of the special assessment made for the work or improvements for which said bond was issued, but his remedy, in case of nonpayment shall be confined to the enforcement of such assessment." The principal sum herein named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvements, and not otherwise. This obligation is not to be deemed or taken to be within, or any part of, the limitation imposed by law as to the indebtedness of said city.

And it is hereby certified, recited and warranted that said city is now and for some years past has been a city of said state, and a body politic and corporate, duly organized, existing and operating under and by virtue of the constitution and laws of the State of Idaho, and is now and always has been under the control of a duly organized Mayor and [fol. 16] City Council as the duly constituted corporate authority thereof; that all things, acts and conditions required by the constitution and laws of the State of Idaho and the ordinances of said city, to exist and to happen and be done and performed, precedent to and in the creation of the said Local Sewerage Improvement District No. 22, and the construction of sewers therein and therefor; and the issuance of this bond in order to constitute the said bond the valid and binding obligation of said city, and payable as aforesaid, do exist and have happened and been done and performed in regular and due form and time; that the total costs and expenses of said improvement have been duly levied and assessed as special assessments for sewerage improvements upon all of the lands, lots and pieces and parcels of land in said Local Sewerage Improvement District No. 22, separately and in addition to all other taxes, and said special assessments are a lien upon said lands, lots and pieces and parcels of land; that due provision has been made for, and said city hereby guarantees, the collection of said special assessments sufficient to pay the interest accruing hereon promptly when and as the same falls due and also to discharge the principal hereof at maturity.

This bond is redeemable in its numerical order by said city on any interest payment date upon call of the Treasurer [fol.17] of said city made prior thereto by publication for thirty (30) days in the official newspaper of said city.

In testimony whereof, the Mayor and Council of the City of Nampa have caused this bond to be signed by the Mayor of said city and attested by the Clerk thereof, under the seal of the city, and countersigned by the City Treasurer, and have likewise caused each of the twenty interest coupons hereto attached in lieu of being so signed, to be signed by having printed thereon the facsimile signatures of said officers, this first day of January, A. D. 1921.

—— ——, Mayor.

Attest: —— ——, City Clerk.

Countersigned: —— ——, City Treasurer.

(Form of Coupon)

No. —. $—.

On the first day of July, (January,) A. D. 19—, the City of Nampa, in the State of Idaho, will pay to bearer — dollars in United States gold coin, or the equivalent thereof in lawful money, out of funds collected by special assessments in Local Sewerage Improvement District Number 22, at the office of the City Treasurer of the City of Nampa, Idaho, [fol. 18] or at the Chase National Bank, in the City and State of New York, U. S. A., at the option of the holder, being six months' interest on special assessment sewerage improvement bond, District Number 22, dated January 1, 1921, and bearing

(Facsimile Signature) —— ——, Mayor.

No. —.

Attest: (Facsimile Signature) City Clerk.

Countersigned: (Facsimile Signature) —— ——, City Treasurer.

VI

That the Mayor and Council of the said City of Nampa, by Ordinance No. 345, adopted and approved the 26th day of October, A. D. 1920, declared that Local Sewerage Improvement District No. 22 within the said City of Nampa, had been duly organized and created; that assessments had been duly levied against the property within said district for the purpose of paying the cost and expense of said improvements; that said assessments were based upon the estimate of the cost and expense of said improvements; that said assessments were insufficient to pay the contract price and the cost and expense of said improvements; that it was necessary that an additional assessment be made against the property within said Local Sewerage Improvement District [fol. 19] No. 22; and ordained that an additional and supplemental assessment should be made upon and against all of the property within said Local Sewerage Improvement District No. 22, in said City of Nampa, which said additional assessment against and upon said property should be made in proportion to the benefits to be derived by said property by reason of the said improvements.

That the Mayor and Council of said City of Nampa, upon the passage of the aforesaid ordinance adopted and approved the 26th day of October, A. D. 1920, made out an additional and supplemental assessment roll in accordance with the provisions of said ordinance, and filed the same in the office of the Clerk of said municipal corporation, who, upon receiving said assessment roll, gave notice to the owners of the property assessed in such assessment roll that the Council of said City of Nampa would meet on the 20th day of December, A. D. 1920, at the hour of eight o'clock P. M., to hear and consider objections to said additional and supplemental assessment roll and all assessments therein, by parties aggrieved by said assessments; that thereafter and on, to-wit, the 10th day of January, A. D. 1921, the Mayor and Council of said City of Nampa, at a regular meeting thereof, having heard and considered all objections made to said additional and supplemental assessment, by resolution, approved and confirmed said additional [fol. 20] and supplemental assessment roll and each of the assessments therein contained, and directed the City Treasurer of said city to publish notice in the manner required by law, advising property owners that said assessment roll had been placed in the hands of said City Treasurer for collection and that any person owning property within said district might redeem the same from and pay such assessment at any time within thirty days from and after the 14th day of January, A. D. 1921.

That the total amount of the additional assessment in said Local Sewerage Improvement District No. 22, in the City of Nampa, Idaho, as finally passed, approved and corrected by the City Council of said city and spread upon the rolls of said city for collection was forty-nine thousand nine hundred and ten dollars ($49,910.00).

VII

That the Mayor and Council of the said City of Nampa, by Ordinance No. 351, adopted and approved the 10th day of January, A. D. 1921, declared that the City Council of the City of Nampa had theretofore, by proper and lawful proceedings, created and established Local Sewerage Improvement District No. 22, in said city, and had caused to be constructed therein sewerage improvements; that an as-

sessment roll had been duly made out in accordance with the provisions of the ordinance creating said district and [fol. 21] that pursuant to the laws of the State of Idaho applicable thereto, due and proper notice of such assessments had been given by the City Clerk and opportunity given to hear all objections relating thereto; that all protests or objections to said assessments had been overruled or adjusted and said assessments confirmed and approved by an ordinance adopted and approved the 6th day of December, A. D. 1920; that through mistake and inadvertence, the amounts assessed in the assessment roll as approved and confirmed were not sufficient to pay the cost of the sewerage improvements constructed in said Local Sewerage Improvement District No. 22, thereby making it necessary for the City Council to make a reassessment upon all of the property in said Local Sewerage Improvement District No. 22 to pay the cost of such improvements; that the Mayor and City Council had theretofore made out a reassessment roll and had caused notice to be given in accordance with law that said reassessment roll was on file in the office of the City Clerk, with the date of filing the same, said notice stating the time at which the City Council would hear and consider objections to said reassessment roll by the parties or any party aggrieved thereby; that at the time appointed for the hearing of objections to said reassessment all objections to said reassessment roll were in accordance with law overruled, adjusted or otherwise satisfactorily disposed of; that in the opinion of the City Council provision [fol. 22] should be made for the issuance of bonds of the district payable out of such reassessments; that when district bonds should be issued under the laws authorizing the same for such improvements, the City Council would be obligated to assess the cost and expense of such improvements against the lots and parcels of land included within such improvement district and which, under the provisions of law and the ordinances of the city, should be liable therefor; and by said ordinance of January 10, 1920, did ordain that all the proceedings, matters and things theretofore taken, had and done in connection with the establishment of said Local Sewerage Improvement District No. 22 in the City of Nampa, the construction of the improvements therein and the apportionment of the cost of said improvements against

the lots, blocks and parcels of land in said district, were in all respects fully approved, ratified and confirmed and the legality, validity and correctness of said proceedings and said assessment and reassessment to the amount thereof levied and apportioned on and against each lot or parcel of land, as specified in the assessment and reassessment rolls, were by said ordinance in all respects established and confirmed; and did ordain that in anticipation of the collection of said assessments and in order to pay the entire cost and expense of the improvements constructed in said district, the city should issue Special Assessment Sewerage Improvement Bonds of the district in accordance with the provisions of Chapter 171 of the Idaho Compiled Statutes, [fol. 23] 1919, and according to said ordinance and all prior ordinances of the city relating to said improvement district; and did ordain that there should be issued in the name of the City of Nampa improvement bonds of said Local Sewerage Improvement District No. 22, in an amount not exceeding the contract price and expense of such work or improvements, which bonds should be dated, should bear interest, should be in the denominations and maturities and should be payable at the same places, should be executed by the same officers and should be in substantially the form as the bonds authorized under the provisions of Ordinance No. 350, adopted and approved the 6th day of December, A. D. 1920, which ordinance did confirm the creation of said district and did authorize the issuance of bonds of said district based upon the assessments originally made therein; and did ordain that said bonds, when executed, should be delivered to the lawful purchasers thereof, in accordance with the contract entered into by said purchasers and the city; and did ordain that the cost and expense of constructing the improvements in said Local Sewerage Improvement District No. 22, set forth in said reassessment roll, were by said ordinance of January 10, 1921, assessed against the lots and parcels of land in said improvement district and against the owners thereof, in the proportions and amounts severally set forth in said reassessment roll, such reassessments to be [fol. 24] paid in ten equal annual installments with interest on all unpaid installments at the rate of seven per centum per annum; and did ordain that said reassessment together with the interest thereon should be a lien in the several

amounts assessed against the lots and parcels of land described in said reassessment roll, from and after the publication of said ordinance, and should have priority over all other liens, except the lien for general taxes.

VIII

That on the 8th day of March, A. D. 1921, in accordance with the ordinances, resolutions and proceedings herein mentioned, defendant caused to be executed and delivered to the purchaser thereof, local sewerage improvement bonds issued in the name of the city, including the bonds now owned and held by the plaintiff herein as hereinafter alleged; that said bonds and the interest coupons thereto attached were in the form set forth in paragraph V of this complaint; that defendant paid the interest on said bonds which became due July 1, 1921, January 1 and July 1, 1922.

IX

That at all times mentioned in this complaint and for a long time prior thereto, there has existed a custom or usage in the municipal bond business general, of submitting records or transcripts and certificates relating to proceedings taken by municipal authorities in the issuance of bonds, to [fol. 25] attorneys for their examination as to the validity of the proceedings taken and the bonds issued pursuant thereto, for the information, guidance and benefit of all purchasers or intending purchasers of bonds; that if such attorneys believe from their examination of such records, transcripts and certificates that such proceedings and the bonds issued pursuant thereto are regular, valid and in accordance with law, they render their written opinion to that effect, for the information, guidance and benefit of all purchasers or intending purchasers of said bonds; that municipal bonds are sold in the open market with the approving opinions of attorneys as to the validity of such bonds, and purchasers depend and rely on such written opinions in purchasing and acquiring bonds, all of which was well known to the defendant herein.

X

That as an inducement for the purchase of the bonds of said Local Sewerage Improvement District No. 22, in said City of Nampa, in accordance with the custom or usage prevailing in the municipal bond business generally, the defendant, the City of Nampa, prepared, put out and published a record or transcript of the proceedings taken relating to said district and the bonds thereof, together with a certain certificate under the seal of said city, intended for use in examination by purchasers or intending pur- [fol. 26] chasers of said bonds and for the information and benefit of the purchasers of such bonds and all subsequent holders or owners thereof; that in preparing, putting out and publishing said record, transcript and certificate, defendant well knew that the same were to be submitted to attorneys for their examination as to the validity of the same and the bonds issued thereunder; that said certificate was in words and figures as follows, to-wit:

STATE OF IDAHO,
County of Canyon,
City of Nampa, ss:

It is hereby certified by the undersigned, the duly elected, qualified and acting Mayor, Clerk and Treasurer of the City of Nampa, in the State of Idaho:

1. That said city was duly incorporated under the general municipal incorporation laws of the State of Idaho, and that there is no litigation pending or threatened concerning the validity of its organization or the right of any of its officers to hold their respective positions.

2. That from the first day of July, A. D. 1919 up to and including the date of this certificate, the following have [fol. 27] been and now are the duly elected, qualified and acting officers of the said city, to-wit: Mayor, H. H. Keim; Clerk, D. W. Moffatt; Treasurer, Gertrude M. Miller; Councilmen, A. O. Brunzell, A. H. Roberts, A. L. Gowan, D. L. McBane, R. B. Burger, C. E. Eakin.

3. That on the 8th day of March, A. D. 1921, there were delivered to Sidlo, Simons, Fels & Company the local sewer-

age improvement bonds of the said city aggregating the sum of $43,000.00, consisting of twenty-five bonds in the denomination of $1,000 each, thirty-six bonds in the denomination of $500.00 each, said bonds being numbered from 160 to 220, inclusive; that said bonds were delivered to the said Sidlo, Simons, Fels & Company, the lawful purchaser thereof, at a price not less than par and accrued interest, and that the proceeds thereof are to be used exclusively for the purpose of paying the costs and expenses of constructing sewer improvements in District Number 22, in said city.

4. That there is no litigation pending and, so far as is known to the undersigned, no threatened litigation with respect to the creation or organization of said Sewerage Improvement District Number 22, the construction therein of [fol. 28] sewer improvements or the issuance of local improvement bonds in payment therefor, and that there are no pending protests or objections against said improvements or bonds, and no appeals pending or threatened in the premises.

In witness whereof, we have hereunto set our hands and affixed the seal of the said city, at Nampa, Idaho, this 8th day of March, A. D. 1921.

H. H. Keim, Mayor. D. W. Moffatt, Clerk. Gertrude M. Miller, Treasurer. (Seal.)

XI

That the statement made in the certificate set forth in paragraph X of this complant, issued by said defendant, the City of Nampa, under date the 8th day of March, A. D. 1921, to the effect that there was on said date, to-wit, the 8th day of March, A. D. 1921, no litigation pending and so far as known to the Mayor, Clerk and Treasurer of said city, no threatened litigation with respect to the creation or organization of said Local Sewerage Improvement District No. 22, the construction therein of sewer improvements or the issuance of local improvement bonds in payment therefor and that there was on said date, to-wit, the [fol. 29] 8th day of March, A. D. 1921, no pending protests or objections against said improvements or bonds and no appeals threatened or pending in the premises, was and is

false, misleading and untrue, in that on said date litigation affecting said district, the construction of sewer improvements therein, and the issuance of bonds therefor, was pending in the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County, Idaho, as hereinafter alleged; and that said statement was made on behalf of said City of Nampa by the Mayor, Clerk and Treasurer thereof, knowing that the same was false, misleading and untrue.

XII

That on or about the 14th day of March, A. D. 1921, a transcript or record of the proceedings relating to the issuance of the bonds of said improvement district, together with the certificate mentioned in paragraph X hereof, were submitted to the firm of Pershing, Nye, Fry & Tallmadge, attorneys of Denver, Colorado, for their examination as to the validity of the bonds issued thereunder; that said firm of attorneys had no notice, knowledge or information as to the falsity of the matters contained in said certificate, but relying on the truth of the matters set forth therein, and basing their conclusion on the statements therein contained and on the recitals, statements and war- [fol. 30] ranties in said bonds, the said firm of attorneys isesued their written opinion approving the validity of said bonds.

XIII

That on or about the 13th day of July, A. D. 1921, the plaintiff herein, being without knowledge of any defect, irregularity or invalidity in the proceedings taken by the Mayor and Council of said City of Nampa in the creation of Local Sewerage Improvement District No. 22, or in the construction therein of said sewerage system, or in the assessment of the cost thereof against the property within said district, or in the issue, sale and delivery of said special assessment sewerage improvement bonds of said District No. 22, but, on the contrary, relying upon the approving opinion of said attorneys and upon the truth of the statements made in the aforesaid certificate set forth in paragraph X of this complaint, and upon the validity of said proceedings and of said bonds and upon the truth of the recitals therein

contained, in good faith purchased three special assessment sewerage improvement bonds of said District No. 22, being bonds numbered 177, 179 and 181, each in the denomination of one thousand dollars ($1,000.00), for which plaintiff paid the sum of three thousand seven dollars and fifty-eight cents ($3,007.58); that said bonds had thereto attached the interest coupons maturing January 1, A. D. 1923 and cou- [fol. 31] pons representing the interest thereafter to become due; that the plaintiff is now the owner and holder of said bonds and interest coupons and that said bonds are unpaid and said coupons payable on the 1st day of January, 1923 and thereafter are unpaid.

XIV

That the Mayor and City Council of the defendant, the City of Nampa, as the responsible agents for said Local Sewerage improvement District No. 22, and of the property owners therein, charged with the duty of proceeding according to law, so carelessly and negligently performed their duties that on, to-wit, the 5th day of February, A. D. 1921, one George N. Lucas, a property owner and taxpayer within said Local Sewerage Improvement District No. 22, commenced a suit in the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County, Idaho, on his on behalf and on behalf of all others similarly interested, against the City of Nampa, the defendant herein, and H. H. Keim, D. W. Moffatt and Gertrude M. Miller, as the Mayor, Clerk and Treasurer respectively, of said city, and against the members of the City Council of said City of Nampa and against Louis C. Kelsey, Charles H. Helmer and S. T. Davis, co-partners doing business as Helmer & Davis, to have declared illegel and void the contract for the construction of the sewerage system in said Local Sewerage Improvement District No. [fol. 32] 22, to enjoin the issuance of any bonds or the collection of any assessments in excess of one hundred eighteen thousand three hundred dollars ($118,300.00), and alleging that certain proceedings had and taken by said City of Nampa and the Mayor, Council and officers of said city with respect to the creation of said Local Sewerage Improvement District No. 22, the construction therein of said

sewerage system, the assessment of the cost thereof against the property within said district, the issue of special assessment sewerage improvement bonds of said District No. 22, were illegal and invalid; that in said suit such proceedings were thereafter had and taken that on, to-wit, the 2nd day of August, A. D. 1922, a judgment was duly entered in said cause in favor of said plaintiff, nullifying and invalidating all assessments in excess of one hundred eighteen thousand three hundred dollars ($118,300.00) and invalidating special assessment sewerage improvement bonds of said District No. 22, including bonds numbered 177, 179 and 181 owned by plaintiff herein; and that thereafter said cause and judgment were appealed by said defendants to the Supreme Court of the State of Idaho and such proceedings had and taken therein that on, to-wit, the 25th day of June, A. D. 1925, said judgment of said District Court of the State of Idaho was affirmed (238 Pac. 288), thereby finally nullifying and invalidating the bonds of said district owned by the plaintiff herein and nullifying and invalidating the special [fol. 33] assessments made by said defendant, the City of Nampa, for the purpose of paying the principal of and the interest accruing upon said bonds, and thereby, without any fault on the part of the plaintiff, depriving this plaintiff of his remedy to secure the payment of the indebtedness evidenced by said bonds and coupons purchased and owned by him as aforesaid, by enforcing the collection of the special assessments hereinbefore described.

XV

That in authorizing the construction of sewer improvements in said improvement district, in levying special assessments therefor, and in issuing the bonds of said district now owned and held by the plantiff herein, defendant was careless and negligent in the following particulars:

(a) That defendant carelessly and negligently failed to have a proper estimate prepared and filed showing the total cost and expense of constructing sewer improvements in said district.

(b) That defendant carelessly and negligently awarded a contract for the construction of improvements in said dis-

trict in a sum in excess of the estimated cost of such construction.

(c) That defendant carelessly and negligently employed an engineer, other than the city engineer, for the purpose of [fol. 34] performing engineering services in connection with the construction of sewer improvements in said district.

(d) That defendant carelessly and negligently caused a false and misleading certificate to be issued with respect to said proceedings and bonds and with respect to pending litigation affecting said district and the bonds thereof.

(e) That defendant carelessly and negligently failed to levy valid assessments for the payment of the costs and expenses of the improvements constructed in said district, and for the payment of the principal of and the interest on the bonds of said improvement district now owned by plaintiff herein.

(f) That defendant has carelessly and negligently failed to make provision for the collection of special assessments for the payment of the principal of and the interest on the bonds of said improvement district now owned by plaintiff herein.

(g) That defendant has carelessly and negligently failed to create or provide a fund for the payment of the principal of or the interest on the bonds of said improvement district now owned and held by plaintiff herein.

(h) That defendant carelessly and negligently issued and delivered bonds of said improvement district, including the bonds now owned and held by plaintiff herein, after the [fol. 35] commencement of a suit to invalidate the special assessments levied to pay the principal of and the interest on said bonds.

XVI

That as an inducement for the purchase of the bonds of Local Sewerage Improvement District No. 22, the defendant, the City of Nampa, executed and issued said bonds containing recitals, statements and warranties for the information and benefit of the purchasers of said bonds and all subsequent holders or owners thereof, as follows:

"That all things, acts and conditions required by the Constitution and laws of the State of Idaho and the ordinances of said city, to exist and to happen and be done and performed, precedent to and in the creation of the said Local Sewerage Improvement District No. 22, and the construction of sewers therein and therefor, and the issuance of this bond in order to constitute the said bond the valid and binding obligation of said city, and payable as aforesaid, do exist and have happened and been done and performed in regular and due form and time; that the total costs and expenses of said improvement have been duly levied and assessed as special assessments for sewage improvements upon all of the lands, lots and pieces and parcels of land in said Local Sewerage Improvement District No. 22, separately and in addition to all other taxes, and said special [fol. 36] assessments are a lien upon said lands, lots and pieces and parcels of land; that due provision has been made for, and said city hereby guarantees, the collection of said special assessments sufficient to pay the interest accruing hereon promptly when and as the same falls due and also to discharge the principal hereof at maturity."

That the said recitals, statements and warranties in said bonds were and are false, untrue and misleading in the particulars alleged in the last preceding paragraph in this complaint, and that the same were made on behalf of said City of Nampa, by the Mayor, Clerk and Treasurer thereof, knowing that the same were false, untrue and misleading; that at the time plaintiff purchased the bonds of said district, he had no notice or knowledge of the falsity of said recitals, statements and warranties but on the contrary, he relied on the truth thereof.

XVII

That the officers of the defendant city charged with the duty of making the assessments to provide for the payment of the cost and expense of said sewerage improvements in said Local Sewerage Improvement District No. 22, and to provide for the payment of said bonds issued in anticipation of the collection of such assessments, were the agents of the city for that purpose; that through the acts, [fol. 37] omissions and negligence of said officers in failing

to take proceedings prescribed by law which would have resulted in valid enforceable assessments, and thereafter in failing, neglecting and refusing to pay or to provide for the payment of the indebtedness evidenced by said bonds and coupons, purchased and now owned by this plaintiff as aforesaid, this plaintiff has suffered loss and damage in an amount measured by the par value of said bonds and coupons.

XVIII

That said defendant, the City of Nampa, has repudiated the bonds and coupons now owned and held by plaintiff; has denied its obligation thereon and has refused and now refuses to pay the same or to provide in any manner for the payment thereof; and that by reason of the matters and things alleged herein, and by reason of the wrongful acts, omissions and negligence of said defendant and its officers and agents, plaintiff has been damaged in the sum of three thousand seven hundred and thirty-five dollars ($3,735.00); that plaintiff has demanded payment of such amount from defendant, but that defendant has refused and still refuses to pay the same.

Wherefore plaintiff prays judgment against the defendant in the sum of three thousand seven hundred and thirty-five dollars ($3,735.00), together with interest on such sum [fol. 38] as provided by law, for costs in this behalf expended, and for such other and further relief as the Court shall deem proper.

Karl Paine, Residence, Boise, Idaho, Pershing, Nye, Tallmadge & Bosworth, Myles P. Tallmadge, Residence, Denver, Colorado, Attorneys for Plaintiff.

(Duly Verified.)

[File endorsement omitted.]

In United States District Court

Demurrer to Amended Complaint—Filed June 24, 1926

Comes now the defendant in the above entitled action and demurs to plaintiff's amended complaint on file therein, and for a cause of demurrer alleges and says:

1. That the court herein has no jurisdiction of the subject-matter of the action.

2. That the court herein has no jurisdiction of the person of the defendant.

3. That the complaint does not state facts sufficient to constitute a cause of action.

[fol. 39] 4. That the action is barred under sub-division 4, Section 6611 Idaho Complied Statutes of 1919.

5. That the action is barred under the provisions of Section 6617 Idaho Compiled Statutes of 1919.

6. That the complaint is uncertain in this: that it does not appear from paragraph II, paragraph XIII, and paragraph XVII, or from either, or any of said paragraphs, or elsewhere in the complaint, how or in what manner the amount involved in this controversy exceeds the sum of three thousand dollars ($3,000.00) exclusive of interests and costs.

7. That the complaint is uncertain in this: that it does not appear from paragraph X, or elsewhere in said complaint, how or in what manner the mayor, clerk and treasurer were authorized or empowered to make the certificate set forth in paragraph X of said complaint;

(a) That it does not appear in paragraph X of said complaint, or elsewhere therein, that the purchasers (Sidlo, Simons, Fels and Co.) of said bonds were not cognizant of the alleged falsity of said certificate, or that the said purchasers in the purchase of said bonds relied upon or believed anything contained in said certificate, or any statement contained in said bonds.

(b) That it does not appear from paragraphs VIII, XIII, or elsewhere in said complaint, when the plaintiff first [fol. 40] discovered the alleged falsity of said certificate, and the alleged invalidity of the bonds purchased by him;

(c) That it does not appear from paragraph XV of said complaint, or elsewhere therein in what manner, or by what means the defendant was careless, or negligent in any of the particulars set forth in said paragraph XV.

(d) That it does not appear from paragraph XVI, or elsewhere in said complaint, in what manner or by what means the defendant or Mayor and Council of said defendant, or the Mayor and Clerk of said defendant and the treasurer thereof, were authorized or empowered to make the statements, recitals, or warranties in said bonds, and set forth in said paragraph XV.

8. That said complaint is ambiguous for all of the reasons set forth in paragraphs 6 and 7 herein.

9. That said complaint is unintelligible for all the reasons set forth in paragraphs 6 and 7 herein.

Respectfully submitted.
Leon M. Fisk, D. L. Rhodes, Attorneys for Defendant, Residing at Nampa, Idaho.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

Karl Paine and Pershing, Nye, Tallmadge & Bosworth, Attorneys for Plaintiff.
Leon M. Fisk and D. L. Rhodes, Attorneys for Defendant.

MEMORANDUM DECISION ON DEMURRER TO AMENDED COMPLAINT—Filed September 22, 1926

DIETRICH, District Judge:

This action was commenced on February 18th, 1926.

Plaintiff is the holder of three bonds of the City of Nampa, Idaho, of the par value of one thousand dollars each, and on account thereof he seeks judgment against the city for $3,735, together with interest. The bonds bear date March 8, 1921, and call for interest at the rate of seven per cent per annum. They are part of an issue of $43,000, supplementing an earlier authorized issue of $118,300, all purporting to be for expenses incident to the construction of sewers in Local Sewerage Improvement District No. 22 of the defendant city. No question has been raised as to

the validity of the $118,300, but in Lucas v. City of Nampa and its officers (238 Pac. 288) the Supreme Court of Idaho, on June 25, 1925, held the supplemental issue to be ultra vires and void. For the sake of brevity that published [fol. 42] decision is referred to for a statement of the statutory provisions and many of the facts underlying the present controversy. It will be noted that while in form the bonds purport to be obligations of the city, each, in compliance with the express provision of the statutes, recites upon its face that the holder "shall have no claim therefor against the municipal corporation by which the same is issued, in any event, except for the collection of the special assessment made for the work or improvements for which said bond was issued, but his remedy in case of nonpayment, shall be confined to the enforcement of such assessment.' The principal sum herein named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvements and not otherwise."

Upon referring to the statutes of the state it will be seen that such local assessments, and the lien created thereby upon the abutting property, may be enforced either by the city or by the holder of bonds in a proceeding to foreclose the lien.

Notwithstanding these and other provisions making clear that it is the intent of the law and of the bonds that the holder's remedy shall be only against the property benefited, that is, the property within the sewerage district, plaintiff seeks a general judgment against the municipality. [fol. 43] Following a decision (June 2, 1926) sustaining defendant's demurrer to the complaint with a view mainly of getting a clearer definition of the theory upon which recovery is sought, plaintiff filed an amended complaint and defendant has again demurred. It may be doubted whether the amended pleading fully meets the requirements of the former decision, but defendant has not moved upon that ground, and I pass it. In doing so I accept and act upon plaintiff's declaration, expressly reiterated in his written brief, that he intends to plead and rely exclusively upon the theory of tort and not of contract. This construction of the pleading it is important to bear in mind, for whether we are considering jurisdiction, the

sufficiency of the facts pleaded, or the statute of limitations, which are the three general questions raised by the demurrer, it has a bearing upon the relevancy both of the decisions cited by plaintiff and the reasons he puts forward in support of his position.

While there are general allegations in the last paragraph of the complaint that the defendant has repudiated the bonds and coupons and refuses to pay the same or provide for their payment, in the light of other specific allegations it is plain that these are not to be taken as importing that defendant or its officers are either wilfully declining or carelessly neglecting to pay or make provision for payment. Clearly at no time since plaintiff acquired his bonds has [fol. 44] the defendant, or its officers, been derelict in any respect thereto. Plaintiff expressly alleges that the bonds are invalid, and upon that ground the court in the Lucas case enjoined defendant and its officers from honoring them or making provision for their payment. A charge of negligence or other wrong doing cannot be predicated upon one's failure to do what he has not the power or lawful right to do, or the doing of which is enjoined by a valid judicial decree. Carpenter v. City of Cohoes, 81 N. Y. 21. It is not contended that defendant was negligent in conducting its defense in the Lucas case; it waged the contest to the court of last resort, and apparently paid the maturing interest coupons until enjoined from so doing.

Nor did the decree operate to avoid the bonds; it only declared them void. They were invalid from the beginning. The point is to be emphasized that plaintiff cannot plead that the bonds are void and in the same count charge defendant with negligence in not making provision for their payment. Nor is it material at this point to inquire whether the Lucas decree is binding upon him. In his position here he chooses to regard it as binding, and to get the relief for which he prays he alleges that the decree invalidates his bonds. If it is not binding upon him and if his bonds are valid, he has ample remedies. In the absence of action upon his part undoubtedly it is binding upon de- [fol. 45] fendant; and even were we to assume the validity of the bonds it could not be charged with negligence in failing to make provision for their payment so long as it is prohibited from acting, by a valid decree which was entered without fault or negligence upon its part.

If for the time being we put aside the effect of the false certificate touching the pendency of the Lucas suit—a matter which will be considered later—what is the case exhibited by the pleading? On July 13, 1921, plaintiff acquired his three bonds from Sidlo, Simons, Fels & Company, or their assigns. This concern had purchased from the city the entire supplementary issue of $43,000, and had accepted the delivery thereof on March 8, 1921. Until after his purchase plaintiff had no dealings or relations of any kind with the city or any of its officers. The bonds purchases were invalid, and because of their invalidity and the Lucas decree based thereon, the defendant and its officers were and are powerless to provide for their payment. It is not shown that plaintiff has suggested any way by which they could be validated or valid instruments of like tenor could be substituted; nor is it shown that any request was ever made for such relief, or that any measures be taken by which the original plan of payment could and would be carried into effect.

[fol. 46] As construed in his written briefs, plaintiff's complaint alleges that his bonds are invalid and accordingly he argues that his only remedy is for a tort. Obviously, therefore, cases ex contractu are not in point. Nor can we regard as precedents tort cases where the plaintiff had valid bonds or other form of contract containing provisions, as here, for payment out of a special fund and the defendant having a duty to provide such fund wilfully or negligently defaulted in the discharge of such duty. The bonds here were invalid ab initio, and at least some of the purposes for which they were issued were illegal. It results that such wrong doing, if any, as is chargeable against defendant occurred prior to the issuance of the bonds. Moreover, if there was any wrong it was not wilful; that is conceded. The defendant's officers acting reasonably and in good faith issued the bonds, under a mistaken view of the law in respect to their powers and in respect to the conditions precedent to their right to exercise the same. That the mistake was not unreasonable would seem to find abundant proof in the fact that with a correct transcript of all the proceedings before them, counsel who here represent the plaintiff approved the validity of the bonds. With

like knowledge of all the proceedings leading up to the issuance of the bonds, the plaintiff purchased them from a third person, who, too, had knowledge. How then can it be held that in thus issuing the bonds the defendant or [fol. 47] its officers committed an actionable wrong upon the plaintiff? If it can be so held, why should anyone at any time go to the trouble and expense of procuring a transcript of the proceedings and a legal opinion based thereon in respect to local improvement bonds? The worst contingency that could happen to a purchaser would be for the bonds to turn out to be valid. It is recognized that such securities, when valid, are not of the highest order. For well-known reasons they bear a higher rate of interest and are less salable than the general bonds of a municipality. But if plaintiff succeeds here he will have the general obligation of the defendant instead of merely a lien upon abutting property, and will thus have succeeded in converting what were supposed to be second class into first class securities. And if he can succeed, under what imaginable circumstances could the holder of such bonds fail, whether they be valid or invalid? The view contended for would operate to make the municipality an insurer not only against the wilful misconduct of its officers and their negligence, but against their honest and reasonable mistakes of which the purchaser of the bonds had knowledge.

With the possible exception of some general expressions in Bates County v. Wills (8th C. C. A.) 239 Fed. 785, there is nothing in any of the cases cited by plaintiff supporting such a doctrine. In the background of all cases there was [fol. 48] a valid contract, one which the municipality had the power to make and the suit was either to enforce the contract according to its terms or to recover damages for the wilful or negligent failure of the officers to make available the fund which the valid contract specified should be created and which it was the duty of the officers to create. Admittedly the decisions of the state courts are at variance upon questions directly or indirectly involved, and they cannot be harmonized. The decisions of the Supreme Court of Idaho do not sustain plaintiff's contention, to say the least. See New First Nat'l Bank v. Weiser, 30 Ida. 15; Broad v. City of Moscow, 15 Ida. 606; Blackwell v. Cœur d'Alene, 13 Ida. 357. There is also some diversity in the

federal decisions, but with the possible exception above noted the cases relied upon by plaintiff are readily distinguishable and cannot be regarded as supporting his position. One, Denny v. City of Spokane, 79 Fed. 719, is from this circuit; another, Barber Asphalt Co. v. Harrisburg, 64 Fed. 283, is from the Third Circuit; and the other four, Barber Asphalt Co. v. Denver, 72 Fed. 336; Mankato v. Barber Asphalt Co., 142 Fed. 329; Bates County v. Wills, 239 Fed. 785, and Oklahoma City v. Orthwein, 258 Fed. 190, are from the Eighth Circuit. A detailed analysis of each case would unduly prolong the discussion, but a few illustrative observations may be helpful.

[fol. 49] In the Denny case, the warrants in question were valid and it was held only that there was sufficient evidence to go to the jury upon the question whether defendant was negligent in failing to provide the special fund for their payment. And it should be added that in this conclusion the court seems to have regarded as decisive McEwan v. Spokane, 16 Wash. 212, 47 Pac. 433, which a few months later was expressly overruled in German American Savings Bank v. Spokane, 17 Wash. 315, 47 Pac. 1103. See also Wilson v. Aberdeen, 19 Wash. 89, and Rhode Island M. & T. Co. v. Spokane, 19 Wash. 616.

But aside from that consideration, obviously to hold a municipality liable in damages for the refusal or neglect of its officers to provide a fund authorized by law for the discharge of a valid contract in no sense constitutes a precedent for holding it liable in case the contract is invalid and the officers are powerless to provide the fund.

In one aspect, Barber Asphalt Co. v. Harrisburg, may be regarded as suggesting the extreme position for which plaintiff contends, but when analyzed it is found to rest upon the fundamental consideration that, as stated by the court, "At the date of the contract (for paving) the defendant had the authority to pave its streets and pay for the same out of its treasury." No such authority existed here. The defendant was empowered to pay for the sewers only out of the local assessment upon the benefited property. [fol. 50] In the Harrisburg case the suit was upon the contract because it was valid. Here the contract is invalid, and the suit is not predicated upon it. The court there impliedly but clearly recognized this distinction when, in dif-

ferentiating Belleview v. Hohn, 82 Ky. 1, it declared that that case was not in point for the reason that there "the municipality was without authority to pay except by assessment on adjoining property."

A similar distinction was recognized in Barber Asphalt Co. v. Denver, which also was brought to enforce a valid contract. The gist of the decision may be gathered from the following language. "If a municipal corporation, which has the power to make a contract for street improvements, contracts for them and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds to be realized by assessments upon abutting property, and the city has the power to make assessments * * * the city is primarily liable," etc.

Like considerations were regarded as controlling in the other cases cited.

Undoubtedly opposed to plaintiff's contention is the case of Pontiac v. Talbot Paving Co. (7th C. C. A.) 94 Fed. 65.

Much is said in the brief to the effect that it would be inequitable for the plaintiff to lose his investment, that [fol. 51] there is no wrong without a remedy, and that plaintiff has no other remedy. It may be true that there is no legal wrong without a remedy, but it does not follow that the courts have the power to guarantee or protect investors against loss. Whether plaintiff has or has not some other remedy we need not decide. Whatever may be our sympathy, certain it is that in an action at law he can be relieved only for a legal wrong and only against those who have done such wrong. While appealing for sympathy and invoking equitable considerations, plaintiff puts aside as being of no concern to him the question of how those upon whom would ultimately fall the burden of the judgment he seeks could retrieve their loss. The better view probably is that the action being one at law, our decision must be limited to the determination of legal rights; but if, as plaintiff seems to contend, in molding the law we should take cognizance of equitable considerations, we must regard the inequity of the judgment he seeks as well as the equities in his favor. Such a judgment while formally against the city would in effect run against the tax-payers therein. Upon the owners in other parts of the city, who through

similar procedure have built and paid for their sewers, would be imposed the burden of paying a share of the cost of these sewers in which they have no interest. They would thus have a double burden. They had no part in the [fol. 52] project resulting in the issuance of plaintiff's bonds; neither did they have the power to interfere or protest or otherwise protect themselves. Whereas the plaintiff bought the bonds with knowledge of the facts and of the law affecting their validity. This consideration is appropriately discussed at some length in German-American Savings Bank v. Spokane, 17 Wash. 315, 47 Pac. 1103, and is briefly adverted to in the Pontiac case, supra (94 Fed. 65). It must be borne in mind that we do not have a case where the plaintiff is seeking to recover from the parties benefited, the value of the benefit he has bestowed upon them. In part the bonds were issued for illegal purposes, of benefit to none of the property owners in the city, and insofar as the purpose was legitimate the expenditure was for the benefit of only the owners of property within the improvement district.

In closing its opinion in Peake v. New Orleans, 139 U. S. 342, 361, the Supreme Court said: "And we trust that this court will never falter in its duty of brushing away all false pretenses, and holding every municipality obedient to the spirit as well as the letter of all its contract obligations. At the same time it is equally the duty of this court, as of all others, to see to it that no burden is cast upon taxpayers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality; and, when a contract for local improvements is entered into, [fol. 53] the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor."

In thus quoting, I do not overlook the qualifying clause "without dereliction or wrong." That consideration has been discussed and the conclusion reached that defendant is not derelict in any duty it owes to plaintiff and cannot be guilty of a wrong for failure to do that which is beyond its power.

If, as would seem to be suggested by the Mankato case, supra, plaintiff is not estopped by the Lucas decree, and if, as for some purposes in his discussion he sometimes seems to assume, his bonds are valid, a remedy may be available against the beneficiaries of the bonds. But that is not the question here submitted for decision. The point is that he can here assert only a legal right and cannot recover against property owners not benefited merely because otherwise he might suffer a loss.

There is left for consideration the one feature of the case having a sinister aspect, namely, the false certificate. The complaint exhibits what purports to be a copy of such certificate, bearing date March 8, 1921, and signed by "H. H. Keim, Mayor, D. M. Moffatt, Clerk, and Gertrude M. Miller, Treasurer," and bearing the seal of the city. Together [fol. 54] with other statements, the correctness of which is not challenged, but some of which are probably not true, the certificate declares that at that time there was no litigation pending or threatened with respect to the sewerage district or issuance of local improvement bonds; whereas, as the plaintiff alleges, the signers knew the Lucas suit, which had been commenced on February 5th, was then pending.

While there is a general allegation that the defendant issued the certificate, it is to be inferred that this is intended only as an averment of the legal effect of the act of the persons signing the same, for in another place it is expressly alleged that such certificate or "statement was made on behalf of said city of Nampa by the Mayor, Clerk and Treasurer thereof." There is no suggestion that defendant's council, which is its governing body, authorized, participated in, or had knowledge of the certificate. The Lucas suit was not a part of the proceedings involved in the issuance of the bonds, and its pendency was not substantially material to the question of their validity. Moreover, in view of the nature of the objections urged by the plaintiff in that suit he could have taken advantage of them at any time, offensively or defensively. See Lucas v. City of Nampa, 238 Pac. 288, 290.

The position of the plaintiff, however, is that the false representation thus made was material, in that it constituted [fol. 55] an inducement to the purchase by him of the

bonds, the implication being that he would not have made the purchase had he known of the pendency of the suit. The primary question therefore is whether the wrongful act of the persons signing the certificate was so far within the scope of their official authority as to render the defendant city liable to plaintiff within the rule of respondeat superior. That their authority to execute such a certificate is not expressed in the statutes is conceded. And it is difficult to see how it can be implied. They were ministerial and administrative officers, without power in respect to the bonds except insofar as they were authorized to act by the council. The power to issue and sell the bonds is vested in this body. It must authorize their issuance, prescribe their form, approve the recitals to be contained therein, and prescribe the conditions of and approve the sale. I find no provision for or suggestion of such a certificate in the statutes, and if it would be within the scope of the council's powers by reason of the general authority that body has to issue and sell the bonds, there is, as already noted, no allegation that it authorized or knew of the certificate.

It can hardly be said that the pertinent circumstances, insofar as they are disclosed by the record, strengthen plaintiff's position. The complaint does not allege when the [fol. 56] bonds were sold to Sidlo, Simons, Fels & Co., and probably we cannot at this juncture accept as a fact the statement found in the opinion in the Lucas case that the contract of sale was made October 25, 1920. But paragraph 3 of the certificate, the correctness of which is not questioned, recites that the bonds had already been delivered to the Sidlo Company, "the lawful purchaser thereof." It is further alleged that the certificate, together with a transcript of the bonding proceedings, was submitted to Pershing, Nye, Frye & Tallmadge for a legal opinion on or about March 21, 1921. And further that on or about July 13, 1921, plaintiff, relying upon such certificate and such legal opinion, purchased the bonds. Manifestly the Sidlo firm was not "induced" by either the certificate or the opinion, for it had previously purchased the bonds and had accepted delivery thereof. Were we to assume that so long as the city held the bonds and desired to sell them these ministerial and administrative officers could involve it in onerous obligations by false representations

without the authorized consent or knowledge of the governing council, surely by no course of reasoning could it be held that such officers were acting within the line of their duty or the scope of their authority in assisting the purchaser of the bonds by a fraud to dispose of them to a third party—a transaction in which manifestly the city could have no interest whatsoever.

[fol. 57] While the plaintiff alleges that he was without knowledge that the certificate was false, it is thought to be significant that though the point was suggested in the former decision he has declined to allege in the amended pleading that the Sidlo firm was without knowledge of the pendency of the Lucas suit.

Plaintiff was bound to take cognizance of the limited authority of the signatory officers, and if, under the facts as disclosed by the certificate itself, they were not acting within the line of their duty to the city, he cannot impose upon it responsibility for their wrong doing. And besides if plaintiff's assignor had knowledge of the pendency of the Lucas suit, is he not bound thereby? The bonds are not "negotiable instruments," and is he not subject to all the defenses that would be available against the Sidlo firm were it the plaintiff in this action? As already noted, plaintiff had no dealings at all with the defendant or its officers. The entire issue of bonds was sold to the Sidlo firm, and plaintiff purchased from them or their vendees.

To a former suggestion that he seemingly concedes that the bonds are non-negotiable, and that he is subject to all defenses which would be available against his vendor, plaintiff now states that he does not make such concession; but no reasons are assigned or cases cited having a contrary view, and I fined none. In the Lucas case, supra, the [fol. 58] Supreme Court of Idaho, expressly held the bonds to be non-negotiable and such seems to be the prevailing view. McQuillan on Municipal Corporations, Sec. 2269; R. C. L. Vol. 19, Municipal Corporations, Sec. 286; 28 Cyc. 1611; Northern Trust Co. v. Alemett, 220 Ill. 417, 77 N. E. 169; Washington Co. v. Williams, 111 Fed. 801; Cleveland etc. Ry. Co. v. Jones Cp., 50 N. E. 319; Bank of La Crosse v. Peterson, 65 N. E. 687.

Without further discussion, upon consideration I have concluded that while the question is not entirely free from doubt, the objection for want of jurisdiction is not well

taken. Bearing in mind the considerations hereinbefore discussed, I sustain the objection that the amended complaint fails to state facts sufficient to constitute a cause of action. I also sustain the demurrer on the ground that the statute of limitation has run—with this brief additional comment: At the time of the purchase, plaintiff knew all the material facts except that the Lucas suit was pending, if that be regarded as a material fact. If he first discovered the falsity of the certificate within the statutory period of limitations, the burden was upon him so to allege. This he has not done. It is not thought that the pendency of the Lucas suit tolled the statute. Plaintiff was not a party to the suit, and by it his hand was not stayed. It is not even a case, as suggested in plaintiff's brief, where a party having two remedies pursues one without success and [fol. 59] then resorts to the other. The plaintiff here took no action and employed no remedy. He remained wholly inactive. Unless the statute of limitations in question has run, it is difficult to see how or when it could ever be held to constitute a bar.

The demurrer will be sustained, and the cause dismissed.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed November 12, 1926

In harmony with Memorandum Decision filed herein on September 22nd, 1926,

It is ordered and adjudged that the above entitled action be and the same is hereby dismissed with prejudice.

This judgment to be entered this day as of September 22nd, 1926.

Dated: Moscow, Idaho, November 12th, 1926.

Frank S. Dietrich, Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed November 5, 1926

To the Honorable Frank S. Dietrich, Judge of said Court:

Comes now the plaintiff by his attorneys Karl Paine and Myles P. Tallmadge, and feeling himself aggrieved by the final judgment of this court entered against him, and in favor of the defendant, on the 22nd day of September, 1926, hereby prays that a writ of error may be allowed him from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of Idaho, Southern Division, and in connection with this petition petitioner herewith presents his assignment of errors.

Petitioner further prays that an order be made and entered fixing the amount of security which plaintiff shall give and furnish upon such writ of error.

Karl Pain, Myles P. Tallmadge, Attorneys for Plaintiff. Pershing, Nye, Tallmadge & Bosworth, of Counsel.

Allowed: Bond $300.00. Frank S. Dietrich, Judge. November 5, 1926.

[fol. 61] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 5, 1926

Comes now the plaintiff in the above numbered and entitled cause, by Karl Paine and Myles P. Tallmadge, his attorneys, and, in connection with his petition for writ of error in this cause, assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which he relies to reverse the judgment herein as appears of record:

1. The court erred in sustaining the demurrer to the amended complaint of plaintiff in error, and in holding that said amended complaint failed to state facts sufficient to constitute a cause of action.

2. The court erred in entering judgment in favor of the defendant and against plaintiff dismissing said cause.

3. That the judgment of the court is contrary to law.

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed and held for naught, and [fol. 62] for such other and further relief as to the court may seem proper.

Karl Paine, Myles P. Tallmadge, Attorneys for Plaintiff in Error. Pershing, Nye, Tallmadge & Bosworth, of Counsel.

[File endorsement omitted.]

In United States District Court

Writ of Error and Return—Filed November 8, 1926

The United States of America,
Ninth Judicial Circuit, ss:

The President of the United States of America to the Honorable Judge of the District Court of the United States in and for the District of Idaho, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between Howard Moore, plaintiff, and The City of Nampa, a municipal corporation, de- [fol. 63] fendant, a manifest error hath happened, to the great damage of the said Howard Moore, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California,

within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 5th day of November in the year of our Lord one thousand nine hundred and twenty-six.

W. D. McReynolds, Clerk of the United States District Court, District of Idaho, Southern Division. (Seal.)

[fol. 64] Allowed by Frank S. Dietrich, District Judge.

Return

The United States of America,
District of Idaho,
Southern Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit, a true and complete transcript of the record and proceedings in the within entitled case.

In witness whereof, I hereunto subscribe my name, and affix the seal of the District Court of the United States for the District of Idaho, Southern Division, at Boise, Idaho, this 5th day of Nov., A. D. 1926.

W. D. McReynolds, Clerk. (Seal.)

Service of the within and foregoing writ of error is hereby acknowledged this 6th day of November, A. D. 1926.

The City of Nampa, by L. M. Fisk, City Attorney.

[File endorsement omitted.]

[fols. 65 & 66] Bond on writ of error for $300.00, approved and filed November 5, 1926, omitted in printing.

[fol. 67] Citation, in usual form, showing service on L. M. Fisk, filed November 8, 1926, omitted in printing.

[fol. 68] In United States District Court

Præcipe for Transcript of Record—Filed November 8, 1926

The Clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled action for the use of the United States Circuit Court of Appeals for the Ninth Circuit, by including therein the following:

1. The amended complaint heretofore filed in said cause by the plaintiff below, the plaintiff in error herein.
2. The demurrer to the amended complaint filed by the defendant below, the defendant in error herein.
3. The judgment made and entered by the court in the above entitled cause on, to-wit, the 22nd day of September, A. D. 1926, entitled "Memorandum Decision on Demurrer to Amended Complaint."

[fol. 69] 4. Order of dismissal or other judgment order based on "Memorandum Decision of Trial Court."

5. Petition on writ of error.
6. Assignment of errors.
7. Writ of error.
8. Bond on writ of error.
9. Citation and acknowledgment of service.
10. Præcipe for transcript.
11. Order allowing writ of error.
12. Clerk's certificate of transcript.

Dated this 5th day of November, A. D. 1926.

Karl Paine, Myles P. Tallmadge, Attorneys for Plaintiff in Error. Pershing, Nye, Tallmadge & Bosworth, of Counsel.

Received a copy of the foregoing Præcipe this 6th day of November, A. D. 1926.

L. M. Fisk, D. L. Rhodes, Attorneys for Defendant in Error.

[fols. 70-72] The attorneys for the defendant desiring no other papers or portion of the record and proceedings in

this court to be incorporated in the transcript of record to be sent to the United States Circuit Court of Appeals for the Ninth Circuit on writ of error, it is hereby stipulated that the papers designated as and for the record in this case in the Præcipe for Transcript may and shall be and constitute the transcript of record to be sent to the United States Circuit Court of Appeals for the Ninth Circuit on writ of error.

Dated this 6th day of November, A. D. 1926.

L. M. Fisk, D. L. Rhodes, Attorneys for Defendant.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

No. 5017

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD MOORE,

Plaintiff in Error,

vs.

THE CITY OF NAMPA, a Municipal Corporation,

Defendant in Error.

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1927, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and twenty-seven. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge; Honorable FRANK H. KERRIGAN, District Judge.

No. 5017.

HOWARD MOORE,

Plaintiff in Error,

vs.

THE CITY OF NAMPA, a Municipal Corporation,

Defendant in Error.

ORDER OF SUBMISSION.

ORDERED above-entitled cause argued by Mr. Myles P. Tallmadge, counsel for the plaintiff in error, and by Mr. D. L. Rhodes, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1927, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighteenth day of April, in the year of our Lord one thousand nine hundred and twenty-seven. Present: Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable GEORGE M. BOURQUIN, District Judge.

No. 5017.

HOWARD MOORE,

Plaintiff in Error,

vs.

THE CITY OF NAMPA, a Municipal Corporation,

Defendant in Error.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Honorable William B. Gilbert and Frank H. Rudkin, Circuit Judges, and Frank H. Kerrigan, District Judge, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk and that a judgment be filed and re-

corded in the minutes of this court in the above-entitled cause in accordance with the opinion of this Court.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5017.

HOWARD MOORE,

Plaintiff in Error,

vs.

THE CITY OF NAMPA, a Municipal Corporation,

Defendant in Error.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before GILBERT and RUDKIN, Circuit Judges, and KERRIGAN, District Judge.

Under the provisions of Chapter 171, Idaho Compiled Statutes of 1919, the City of Nampa, hereinafter named the defendant, organized a special improvement district for a sewer improvement of which the engineer's estimate of cost was $118,300. Assessments for that amount levied against the benefited property were insufficient to pay said cost. Thereafter, in proceedings begun October 26, 1920, the defendant undertook to increase the assessments to meet the increased cost by passing an ordinance under Section 4141 of said Compiled

Statutes, which authorized reassessment "when for any cause, mistake, or inadvertence the amount assessed shall not be sufficient to pay the costs of sewerage improvements." On January 10, 1921, the defendant by ordinance approved the reassessment-roll and directed the issuance, sale and delivery of bonds therefor. The bonds so issued contained recitals that all the conditions, acts and things required by the constitution and laws of Idaho to constitute them valid obligations of the city had been done and performed in due form and time, that the total costs and expenses of said improvement had been duly levied and assessed on the property in the district and were liens thereon, and that due provision had been made for the collection of assessments for the payment of principal and interest on said bonds. On March 8, 1921, the defendant issued a certificate that bonds in the sum of $43,000 were that day delivered to a named lawful purchaser at a price not less than par and accrued interest, that there was no pending or threatened litigation with respect to the creation of the district, the construction of the improvement, or the issuance of bonds therefor, and that there were no pending protests or objections against the improvements or bonds, and no appeals pending or threatened in the premises. In July, 1921, the plaintiff, relying on the recitals in the bonds and the truth of the representations made in said certificate, and the opinion of certain bond attorneys, purchased three of the bonds without notice of any

defect or infirmity therein or in any of the proceedings on which they were based. But the fact was that on February 5, 1921, and prior to the issuance of said certificate stating that no litigation was pending, one Lucas, a property owner in the improvement district, on behalf of himself and all others similarly situated, had commenced an action in one of the state courts against the City of Nampa and its officers to have the contract for the construction of the improvement declared illegal and to enjoin the levy and collection of assessments against the property in excess of the original estimate. Decree in his favor was entered August 2, 1922, and on appeal to the Supreme Court of Idaho, the judgment was affirmed June 25, 1925, Lucas vs. City of Nampa, 238 Pac. 288. In the decision the Supreme Court referred to Compiled Statutes, Section 4141, which provides for a reassessment in cases where special assessments have failed to be valid for any want of form or conformance with the provisions of law governing the same, and held that the reassessment attempted to be made in that case was not made for any reason assigned in the statute and was not made in conformity therewith, but, on the contrary, the city authorities found that after paying a ten per cent commission for the sale of the bonds, the employment of a city engineer upon a basis of five per cent of the cost of the project, and in incurring other expenses they greatly exceeded the cost as found in the estimate of the city engineer in the original ordinance of

intention, and that there was no statute providing for the employment of an engineer other than the city engineer, and that the contract let in excess of the sum which the authorities were authorized to expend was to that extent illegal, and the Court held that the suit having been instituted by a taxpayer before the bonds were sold his right of action could not be defeated by the sale and transfer of the bonds. In his complaint the plaintiff alleged that the defendant was negligent in failing to have the preliminary estimate of cost prepared and filed in the manner and amount required by law, in awarding a contract in a sum in excess of the estimated cost, in causing a false and misleading certificate to be issued, in failing to levy valid assessments, and in failing to collect assessments for the payment of plaintiff's bonds or creating or providing a fund for the payment thereof, and in issuing bonds after the commencement of the Lucas suit. He alleged that he had paid $3,007.58 for the bonds and he demanded judgment for that sum and interest, amounting in all to $3,735. A demurrer to the complaint was sustained on the ground that it failed to state a cause of action and that the cause of action was barred by the statute of limitations. GILBERT, Circuit Judge, after stating the facts:

The plaintiff contends that the defendant is liable in damages as for tort, and he asserts that his cause of action sounds in tort and is based on the proposition that the defendant had the power so to conduct the proceedings that valid assessments would

have resulted for the payment of the bonds and that because of negligent acts and omissions of the defendant and its officers in exercising the granted powers the assessments failed and the plaintiff was deprived of his statutory remedy against the property in the district. There is no allegation that the money which he paid upon his purchase of the bonds was in the possession of the defendant or remained undisbursed, and no fact is pleaded from which it might be deduced that the plaintiff was entitled to recover as for money had and received, as was held in Hitchcock vs. Galveston, 96 U. S. 341; Louisiana vs. Wood, 102 U. S. 294; Incorporated Town of Gilman, 141 Fed. 941; Hoag vs. Town of Greenwich, 133 N. Y. 152; Dodge vs. City of Memphis, 51 Fed. 165, 167. But the plaintiff seeks to charge the defendant with liability solely on account of alleged acts of negligence of its officers and thus impose upon the general taxpayers of the city responsibility for the payment of local improvement bonds and defeat the protective purpose of the statute whereby by express terms the general taxpayer is relieved of all liability for the cost of the local improvement, there being no contention that the money received here was diverted to a corporate purpose or was used in such manner as to create an obligation on the part of the defendant to repay it. Section 4151 of the Idaho Compiled Statutes of 1919 provided that the holder of bonds issued for a local improvement such as that which is here involved "shall have no claim

therefor against the municipal corporation by which the same is issued in any event, except for the collection of the special assessment made for the work of improvement for which said bond was issued, but his remedy in case of nonpayment shall be confined to the enforcement of such assessment." The bonds which were issued to the plaintiff contained the recital of that provision of the law. It is to be borne in mind that the officers of the defendant in making the improvement were not performing corporate functions of the defendant. They were exercising a special power vested in them with reference to local improvements in which the city as a whole was not concerned. In doing so they were successors to powers which prior to 1917 had been exercised through a "sewer construction committee" distinct from the city council appointed for the purpose of authorizing and carrying out sewerage improvements. In all the transactions here involved they were but instrumentalities for originating, carrying out and paying for the expense of local improvements, the cost of which was assessable against the property benefitted thereby. In this fact is an insuperable obstacle to the right of the plaintiff to recover herein, for the officers of the city were not acting on its behalf and they had no authority to bind it by any act or failure to act in the premises.

It is well settled that municipal corporations possess no inherent power to levy assessments for local improvements and that their only authority

to do so is to be found in legislative acts (25 R. C. L. 88), and it is uniformly held that in collecting money to pay for special improvements where there is no liability against the corporation, the corporation authorities do not act as its representatives, but as special agents or instrumentalities to accomplish a public end. Quill vs. City of Indianapolis, 124 Ind. 292; Town of Capitol Heights vs. Steiner, 101 So. 451; City of Bainbridge vs. Jester, 157 Ga. 505; Town of Windfall City vs. First Nat. Bank, 172 Ind. 679, 690; Beggs vs. Kelly, 238 Pac. 466; Gagnon vs. City of Butte, 243 Pac. 1085; Broad vs. City of Moscow, 99 Pac. 101. In Town of Windfall City vs. First Nat. Bank, the plaintiff sought to fix liability upon the town upon the allegation that the assessments were invalid and not legally collectible and that the town was not proceeding under the general powers vested in it for the improvement of its streets. In Town of Capitol Heights vs. Steiner the complaint alleged negligent failure of the officers of the town to make a sufficient assessment. In Broad vs. City of Moscow the plaintiff claimed damages for the alleged failure of the city to deliver the bonds at the date of the completion of his contract. In Gagnon vs. City of Butte it was alleged that the city had failed and neglected to collect the delinquent assessments or pay the bonds. The case differs from Bates County, Mo., vs. Wills, 239 Fed. 785, relied upon by the plaintiff. In that case, while it was expressly stipulated that the contractor should be paid

out of funds realized from special assessments against the property benefited, there was no statutory prohibition against a general levy to pay the contract price, and the Court affirmed the power of the municipal corporation to make such general levy.

We find no error in the ruling of the Trial Court in sustaining the demurrer on the ground above indicated and we find it unnecessary to consider the other ground of demurrer. The judgment is affirmed.

[Endorsed]: Opinion. Filed Apr. 18, 1927. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5017.

HOWARD MOORE,

Plaintiff in Error,

vs.

THE CITY OF NAMPA, a Municipal Corporation,

Defendant in Error.

JUDGMENT U. S. CIRCUIT COURT OF APPEALS.

In error to the District Court of the United States for the District of Idaho, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Idaho, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered Apr. 18, 1927. Frank D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5017.

HOWARD MOORE,

Plaintiff in Error,

vs.

THE CITY OF NAMPA, a Municipal Corporation,

Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-five (85) pages, numbered from and including 1 to and including 85, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, and certified under Rule 35 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 29th day of June, A. D. 1927.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8655)

FILED
JUL. 16 1927
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 384

HOWARD MOORE, PETITIONER,

vs.

THE CITY OF NAMPA, A MUNICIPAL CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

GEORGE L. NYE,
DENVER, COLORADO,
Attorney for Petitioner.

JAMES H. PERSHING,
MYLES P. TALLMADGE,
DENVER, COLORADO,
Of Counsel.

(32,836)

MAY—JUNE, 1927.

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Dinner Manhattan Club Queen's 60

MAY, 1927.

Sunday after Ascension.

Memo.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 384

HOWARD MOORE, PETITIONER,

vs.

THE CITY OF NAMPA, A MUNICIPAL CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Howard Moore respectfully shows to this Honorable Court:

1. That on the 17th day of June, 1926, petitioner filed in the District Court of the United States for the District of Idaho, Southern Division, his amended complaint, wherein he alleged in substance that he had

been damaged by reason of false representations made by respondent, which were relied on by petitioner in the purchase of certain local sewer improvement bonds issued by respondent, and because respondent conducted the proceedings for the issuance of said bonds so negligently that it lost the right to create a fund out of which the bonds could be paid.

2. That on the 22d day of September, 1926, after argument, said district court rendered a decision sustaining a demurrer to said amended complaint on the grounds that the same did not state facts sufficient to constitute a cause of action, and that the Idaho statutes of limitation had run against the cause; that on said last-mentioned date judgment was entered dismissing the action with prejudice.

3. That thereafter the matter was taken to the United States Circuit Court of Appeals for the Ninth Circuit on writ of error, and, after argument, that court rendered its final decision on the 18th day of April, 1927 (R., 84), affirming the judgment of the court below on the ground set forth in the opinion of said circuit court of appeals (R., 77).

A certified copy of the entire record of said case in the said circuit court of appeals is hereby furnished, attached to, and made a part of this application in compliance with Rule 35 of this Honorable Court.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified

to it for its review and determination, in conformity with the provisions of Section 240 (*a*), Judicial Code, for the following reasons:

A. That said decision by the circuit court of appeals is in conflict with the decision of this Honorable Court in the case of Peake *vs.* New Orleans, 139 U. S., 342, which holds in effect that a municipality is liable generally when it fails to prescribe and provide sufficient machinery for the collection of special assessments, or when special assessments fail on account of some dereliction or wrong on the part of the municipality.

That said decision is also in conflict with the one rendered by this Honorable Court in the case of District of Columbia *vs.* Lyon, 161 U. S., 200.

B. That said decision of the Circuit Court of Appeals (Ninth Circuit) is in conflict with a decision of the Circuit Court of Appeals for the Third Circuit in the case of Barber Asphalt Paving Company *vs.* City of Harrisburg, 64 Federal, 283, wherein a municipality was held liable generally after special assessments which it had attempted to levy had been held invalid.

C. That said decision of the Circuit Court of Appeals (Ninth Circuit) is in conflict with decisions of the Circuit Court of Appeals for the Eighth Circuit, as follows:

Barber Asphalt Paving Co. *vs.* City of Denver, 72 Federal, 336.

City of Mankato *vs.* Barber Asphalt Co., 142 Federal, 329.

Bates Co., Mo., *vs.* Wills, 239 Federal, 785.

Oklahoma City *vs.* Orthwein, 258 Federal, 190.

The foregoing decisions hold in effect that when a municipal corporation has the power to provide for improvements and pay for the same out of special assessments, it becomes liable generally if it fails to take the necessary steps to provide the fund out of which payment can be made.

D. That said decision of the Circuit Court of Appeals (Ninth Circuit) is in conflict with its own decision in the case of Denny *vs.* Spokane, 79 Federal, 719, wherein the court said:

> "If the city was negligent in failing to provide a fund out of which the warrants issued by it could be paid within a reasonable time, it is liable for any damages which the contractor or bank has suffered by reason of such neglect of duty."

E. That petitioner is informed and believes there are many millions of dollars of special improvement bonds of the character involved in this case, held by investors and in circulation in this country at this time, and that in the ordinary course many more millions of such bonds will be issued by municipalities and taxing bodies; that it is a matter of great importance to such municipalities and taxing bodies and the property owners and taxpayers therein, to contractors, to bondholders and investors, and to the public generally that it be authoritatively determined whether municipalities are to be held liable for their failure to provide special assessment funds, as decided in cases cited, or not liable, as decided by the Circuit Court of Appeals (Ninth Circuit) in the case at bar.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case, entitled Howard Moore *vs.* The City of Nampa, a Municipal Corporation, No. 5017, to the end that the said case may be reviewed and determined by this Court, as provided by Section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of the said circuit court of appeals in the said case and every part thereof may be reversed by this Honorable Court.

GEORGE L. NYE,
Attorney for Petitioner.

STATE OF COLORADO,
City and County of Denver, ss:

George L. Nye, being duly sworn, says that he is one of the attorneys for Howard Moore, the petitioner above named; that he has read said petition by him subscribed, and that the facts stated therein are true to the best of his knowledge and belief.

GEORGE L. NYE.

Subscribed and sworn to before me this 7th day of July, A. D. 1927.

[SEAL.] I. ANSON WEST,
Notary Public.

My commission expires November 8, 1927.

BRIEF IN SUPPORT OF PETITION.

Decisions in Courts Below.

Howard Moore *vs.* The City of Nampa, U. S. District Court, for the District of Idaho, Southern Division (R., 41-59).

Howard Moore *vs.* The City of Nampa, U. S. Circuit Court of Appeals, Ninth Circuit (R., 77-84).

Jurisdiction.

Jurisdiction of this Honorable Court is invoked under Section 240(a), Judicial Code, and review on writ of certiorari is sought on the ground that the decision of the Circuit Court of Appeals conflicts with decisions in other cicuits and with decisions of this Court on the same subject.

Petitioner believes it to be a matter of great importance to municipalities and taxing bodies and to the property owners therein, to contractors, to bondholders and investors, and to the public generally to have the question of liability, under circumstances set forth in the record in this case, authoritatively and finally determined.

The date of the judgment sought to be reviewed is April 18, 1927 (R., 84).

In the court below, the specific claims advanced were that the respondent city had the power to conduct special improvement proceedings in such a way as to create a fund out of which bonds issued for cost

of construction could be paid; that the proceedings were conducted so negligently that the city lost the right to levy assessments for the creation of such a fund; that the respondent city was liable for the acts of its officers performed within the scope of their employment; that by reason of respondent's acts and omissions in the premises, petitioner was damaged, and that petitioner has no remedy other than the one sought herein.

The court below ruled that the officers of respondent city were mere instrumentalities to carry out special powers; that they were not performing corporate functions in connection with said proceedings, and that the city was not liable for their acts or failure to act in the premises (R., 82-83), all of which petitioner contends is in conflict with decisions of other circuit courts of appeal and with decisions of this Court.

The cases believed to sustain the jurisdiction of this Court under Section 240(a) of the Judicial Code are as follows:

Forsyth *vs.* Hammond, 166 U. S., 506.
Cole *vs.* Ralph, 252 U. S., 286.
Loyne *vs.* Western Well Works, 261 U. S., 387.
Thompson Co. *vs.* Ford Co., 265 U. S., 445.
Concrete Appliance Co. *vs.* Gomery, 269 U. S., 177.

Statement of Case.

In 1919 and 1920, acting under the provisions of Chapter 171, Idaho Compiled Statutes, 1919, respondent city organized and created a special improvement

district for the purpose of constructing sewerage improvements therein. The engineer's original estimate of the cost of the proposed improvements was $118,300 and assessments totaling that amount were levied against the property benefited (R., 13). These assessments were not sufficient to pay the total cost of the improvements, and the respondent undertook further proceedings to increase the special assessments to meet the increase in cost, and issued and sold bonds based on such subsequent proceedings (R., 18-19).

In its subsequent proceedings, however, the respondent, in the attempted exercise of a power it possessed, proceeded so negligently that the validity of its acts was challenged (Lucas *vs.* Nampa, 238 Pac., 288) and the collection of special assessments to pay the supplemental bonds was enjoined (R., 31-32).

The proceedings relating to the additional assessments were begun on October 26, 1920, when the city council adopted Ordinance No. 345, reciting the previous levy of assessments, that such assessments were insufficient to pay the contract price, costs and expenses of the improvements, and that an additional assessment was necessary. Ordinance No. 345 authorized an additional or supplemental assessment, and directed that notice thereof be given in accordance with law. Respondent proceeded upon the belief that its action was authorized by the second paragraph of Section 4141, Idaho C. S., 1919, which section authorized a reassessment when "for any cause, mistake or inadvertence, the amount assessed shall not be suf-

ficient to pay the costs of sewerage improvements" (Appendix).

On January 10, 1921, the city council adopted Ordinance No. 351, confirming the proceedings theretofore taken, approving the reassessment roll, and anticipating the collection of assessments by directing the issuance of additional bonds and the delivery of the same to the purchaser (R., 20).

In accordance with Ordinance No. 351, respondent issued its additional bonds, which contained recitals that all conditions, acts and things required by the constitution and laws of the State of Idaho to constitute the bonds valid obligations of the city had happened, been done and performed in due form and time; that the total costs and expenses of said improvements had been duly levied and assessed on the property in the district and were liens thereon, and that due provision had been made for the collection of assessments for the payment of principal and interest on said bonds (R., 15-16).

On March 8, 1921, respondent issued its certificate reciting that bonds of said improvement district in the sum of 43,000, numbered 160 to 220, inclusive, were on that day delivered to Sidlo, Simons, Fels & Company, the lawful purchaser thereof, at a price not less than par and accrued interest; that there was no pending or threatened litigation with respect to the creation of the district, the construction of the improvements therein or the issuance of bonds therefor, and that there were no pending protests or objections against

the improvements or bonds and no appeals pending or threatened in the premises (R., 26-28).

In accordance with the custom prevailing in the municipal bond business generally, a record or transcript of the proceedings, including the respondent's certificate of no litigation pending, was submitted to the law firm of Pershing, Nye, Fry & Tallmadge, for examination as to the validity of the city's proceedings and the bonds issued thereunder. Said attorneys, relying on such proceedings, disclosed by the record, and relying on the truth of respondent's statements in its certificate and the recitals in the bonds, rendered their written opinion approving the validity of the bonds (R., 29).

In July, 1921, petitioner, relying on the recitals in the bonds and the truth of the representations made by respondent in its certificate and the opinion of the bond attorneys, purchased three of the bonds issued by respondent in the open market for a valuable consideration and without notice or knowledge of any defect or infirmity in the bonds or the proceedings on which they were based (R., 30).

The statement in the certificate that there was no litigation pending is material and important for the reason that under the provisions of Section 4137, Idaho C. S. 1919 (appendix), no suit to set aside assessments or enjoin the making of the same could be brought nor could any objection to the validity of the same be allowed after the expiration of thirty days from the date when the assessments were ascertained or confirmed. If no suit had been pending on March 8,

1921, as stated in respondent's certificate, none could have lawfully been brought thereafter, and instead of worthless paper, petitioner would have had what he paid for and what the respondent assured him he was getting, namely, an enforceable special assessment obligation of the municipality.

On February 5, 1921, prior to the issuance of the respondent's certificate that there was no litigation pending, one George N. Lucas, a property owner in the improvement district, suing on behalf of himself and all others similarly situated, had commenced a suit in the District Court of Canyon County, Idaho, against the city of Nampa and its officers, to have the contract for the construction of the improvements declared illegal and to enjoin the levy and collection of all assessments against the property in the district, in excess of the original estimate, $118,300. Decree in favor of plaintiff was entered August 2, 1922, and an appeal taken to the Supreme Court of the State of Idaho. On June 25, 1925, the supreme court affirmed the judgment of the lower court.

Lucas *vs.* City of Nampa, 238 Pac., 288 (R., 32).

Lucas *vs.* Nampa decided:

1. That the contract was void as to the excess above the engineer's preliminary estimate.

2. That the attempted re-assessment was illegal.

3. That the city had no authority to hire an engineer other than a city engineer.

4. That the suit was commenced February 5, 1921, within thirty days after the final assessment was confirmed.

5. That the bonds were not delivered until March 8, 1921.

6. That the bondholders were not necessary parties to the suit.

7. That the trial court properly restrained the levy of assessments to pay for bonds in excess of the engineer's estimate.

8. That there was no authority for paying a commission for the sale of bonds.

The effect of the decision in the Lucas case was to render worthless the bonds and coupons now owned and held by petitioner.

Petitioner brought this action on February 18, 1926, alleging that respondent was careless and negligent in the following particulars:

(*a*) In failing to have the preliminary estimate of cost prepared and filed, in the manner and amount required by law.

(*b*) In awarding a contract in a sum in excess of the estimated cost.

(*c*) In employing an engineer other than the city engineer.

(*d*) In causing the false and misleading certificate to be issued.

(*e*) In failing to levy valid assessments.

(*f*) In failing to collect assessments for the payment of the bonds in question.

(*g*) In failing to create or provide a fund for the payment of the bonds in question.

(*h*) In issuing bonds after the commencement of a suit to invalidate the assessments (R., 33-34).

It is alleged that as an inducement to purchasers respondent issued bonds containing recitals, statements and warranties set forth at length in the amended complaint, to the effect that all requirements of law and all conditions precedent had been duly complied with, that assessments had been properly levied and were liens on the property improved, and that the city guaranteed the collection of assessments sufficient to pay the principal and interest on the bonds issued (R., 35).

Petitioner also alleged that because of the acts, omissions and negligence of respondent in failing to take proceedings prescribed by law which would have resulted in valid enforceable assessments and because it issued the false and misleading certificate, respondent damaged petitioner, that demand for payment was made, but that respondent refused and still refuses to pay such damages (R., 37).

Respondent's demurrer to the amended complaint was sustained by the district court below, on the grounds that such complaint failed to state a cause of action, and that the statutes of limitation had run against the cause (R., 58-59).

The circuit court of appeals affirmed the judgment on the first ground, stating that it was unnecessary to consider the other ground of demurrer (R., 84).

Assignment of Errors.

It is respectfully submitted that the circuit court of appeals in rendering its decision erred in the following particulars:

1. In failing to give effect to the decisions of this Honorable Court and the other circuit courts of appeal, cited herein.

2. In assuming that petitioner's cause of action was in any way dependent upon allegation or proof as in an action for money had and received.

3. In holding that respondent's officers in making the improvement were not performing corporate functions of the respondent; that they were mere instrumentalities in carrying out a special power, and that respondent was not liable for their acts or omissions.

4. In holding that the case at bar differs from Bates County, Mo., *vs.* Wills, 239 Federal, 785.

5. In affirming the judgment of the district court.

Summary of Argument.

I.

The decision of the circuit court of appeals is in conflict with decisions of this Court and decisions in other circuits.

contract with respondent city are set forth in the bonds and the statutes authorizing the same.

It cannot be said that the contract set out in the bonds was in violation of the city charter or of any statute. On the contrary such bonds were issued pursuant to statute. Neither can it be said that the contract to construct the improvements was beyond the power of the city in the sense that there was no statutory authority therefor. At most there was only an irregularity in the exercise of a granted power, for which irregularity the city alone was responsible.

It has been sometimes suggested that the case of Hitchcock *vs.* Galveston has been overruled or at least modified by the case of Peake *vs.* New Orleans, 139 U. S., 342, but such is not the fact. In the latter case Justice Brewer said, at page 353:

> "This is not a case in which there was a failure on the part of the legislative body, the city council, to prescribe and provide sufficient machinery for the collection of assessments."

It was held that the city was not liable in this latter case, but it appeared that the city had no control over the funds or the manner or method of raising the same. The court concludes:

> "When a contract for local improvements is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor."

In the case now before this Court there was dereliction and wrong on the part of the city.

In District of Columbia *vs.* Lyon, 161 U. S., 200, special improvement certificates were issued to Birch, contractor, and later assigned to plaintiff for value. Defendant's officers omitted to place the assessments of record prior to the time the particular property was sold to an innocent purchaser. As the assessments could not be enforced, action was brought in *assumpsit*. This Court concurred in the views of the Supreme Court of the District of Columbia, in holding that if payment could have been made out of the special tax, but was lost by defendant's omission, a duty to pay would fairly belong to the District. Justice Fuller said:

> "The work was done in pursuance of a valid contract, and the city, and the District, received the benefit thereof. As the city, and then the District, failed to make the required assessments, the District became liable and the certificates of indebtedness were valid obligations" (citing cases).

If it be said that the form of the action at bar is not the same as those in the preceding cases, or that petitioner did not allege that the bond purchase money was in the possession of the respondent or remained undisbursed, we call attention to Section 4143, of the Idaho Statutes (Appendix), which permits the bonds to be issued to the contractor or sold with a specific direction "to pay the proceeds to the contractor." In Ordinance No. 351 (R., 20-22) respondent's mayor and

council recited that the improvements had been constructed, and authorized the delivery of bonds to the lawful purchasers. The mayor, clerk and treasurer certified that the bonds were delivered "at a price not less than par and accrued interest, and that the proceeds thereof are to be used exclusively for the purpose of paying the costs and expenses of constructing sewer improvements" (R., 27-28).

Barber Asphalt Paving Co., *vs.* City of Harrisburg, 64 Federal, 283 (3rd C. A. A.), was an action to recover an unpaid balance on a paving contract. The city had power (as has the city of Nampa in respect to sewers) (Section 4132, Appendix) to pay out of its general treasury, but it also believed that under an act of the legislature it had power to pay for paving out of special assessments which it attempted to levy. After the work had been completed the Supreme Court of Pennsylvania declared the legislative act invalid. The contract entered into provided that the company should accept assessments in payment, and that "the city shall not be otherwise liable under the contract whether the said assessments are collectible or not." The quoted language is substantially the same as the wording of the Idaho statute. The court said:

> "The agreement to accept the assessments in payment relieved the city from liability to pay otherwise. By it the plaintiff assumed the risk of collecting. If the defendant, in such case, had made and transferred the contemplated assessments, it would have discharged its entire obligation; just as it would in the present case. This, however, it has not done. Its attempt to

do it failed; its acts in this respect were a nullity. It is immaterial that the failure resulted from want of authority—as it would be if it resulted from any other cause beyond its control. It undertook, unconditionally, to make and transfer assessments, and its failure is a breach of the contract. To say its obligation is discharged by a vain attempt to make them; that the plaintiff is bound to accept useless forms of assessments, is unreasonable. The parties contemplated valid charges on the property. The term 'assessment' clearly implies this; nothing short of a lawful assessment—one capable of enforcement, satisfies it. It was such assessments the plaintiff agreed to accept, and assumed the risk of collecting. The parties were mutually mistaken respecting the authority to pay in special manner designated; but this does not relieve the defendant from its obligation to pay.

"If anything is wanting to render this construction clearer, it may be found in the fact that the language involved is taken, word for word, from the statute and must necessarily signify here what it does there. There the term 'assessment' signifies, and can only signify a proceeding which creates a charge on the property specified. The statute first provides for this proceeding and charge, and then for its transfer to the contractor. It is this charge which is to be transferred, and which the contractor is to assume the risk of collecting. There is always some risk attending such collections. Prior liens, or other causes, may render the property insufficient to pay. And this only is the risk the statute, and the contract made under it contemplated.

> "The defendant having failed to make the required assessments is in default upon its contract, and must make reparation by paying the consequent loss. There is no hardship in it, and if there was it would afford no justification or excuse for shifting it to the plaintiff. The defendant has received full value for what it is required to pay; and if the contract admitted of another construction we would strongly incline to the one adopted, because it is not only consistent with the intention of the parties, but avoids the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it."

Petitioner contends that the case from which the foregoing quotation is taken is on "all fours" with the case now before this Court, except that there the contractor agreed to look to the assessments for payment, while in this case the bondholders (by virtue of the statute) made the same agreement. This difference, however, does not affect the principle on which the case was decided. In the Harrisburg case the actual contract made proved ineffectual because of the invalidity of the legislative act, and therefore the city was held responsible under its implied liability. Had the plaintiff elected to waive his contractual rights and sue in court, the reasoning of the court and the conclusion reached would have been the same.

Barber Asphalt Paving Co. *vs.* City of Denver, 72 Fed., 336 (8th C. A. A.), was a contract action to recover for paving, the city having agreed to pay partly out of general funds and partly out of special assessments to be levied against a street railway and other

property. The city failed and refused to collect the assessment against the street railway property and denied any liability therefor. The court cited numerous authorities to sustain the following propositions:

> "If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds realized or to be realized by assessments upon abutting property, the city is primarily and absolutely liable to pay the contract price itself, if it has no power to make such assessments, or if the assessments it attempts to make are void.
>
> "If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds to be realized by assessments upon abutting property, and the city has power to make the assessments, but fails to do so, or fails to make valid assessments, and thereby to provide the fund out of which the contractor may receive the price of his labor and materials, the city is primarily and absolutely liable to pay the contract price itself. (Citing cases.) In cases of this character the city becomes primarily liable, even when the contract expressly provides that the contractor shall accept the assessments in payment of the contract price, and that the city shall not be otherwise liable, whether the assessments are collectible or not. (Citing

> cases.) There is no substantial conflict of authority upon these propositions, and the principle they establish is decisive of the question under consideration."

Denny *vs.* City of Spokane, 79 Fed., 719 (9th C. C. A.), was an action for damages by the receiver of a bank to which special assessment warrants had been assigned, for the negligence of defendant city in failing to provide a fund out of which such warrants could be paid. The State court had invalidated certain assessments and before reassessments could be collected some of the claims had become outlawed. It was stipulated that the delay in collecting assessments was due to a mistake, misunderstanding or ignorance of the law by the city officials. The first question in the case was whether the city was negligent in not creating a fund in time for payment of the warrants. On this point the court said:

> "If the city was negligent in failing to provide a fund out of which the warrants issued by it could be paid within a reasonable time, it is liable for any damages which the contractor or bank has suffered by reason of such neglect of duty."

The court then quotes from McEwan *vs.* City of Spokane, 47 Pac., 433, as follows:

> " 'Under the special contract in this case and under the law it was not the duty of the contractors to look after the assessment. That was a duty which not only the law imposed upon the city, but which the special conditions of its con-

tract imposed upon it; and, if the city was mistaken in regard to its construction of the law, the city must be responsible for such mistake, and not the contractors, who were not authorized to construe or enforce the law. Eidenmiller *vs.* City of Tacoma (Wash.), 44 Pac., 877. The record shows that the statute of limitations, under the rule laid down by this court in Stevens *vs.* City of Spokane, has run against a portion of these grade taxes, and the city having failed to collect the said taxes until after the statute has run, would, of course, be powerless to collect them now; hence it must necessarily follow that the city is liable to the plaintiff for its failure to collect them within a reasonable time, as a reasonable time must necessarily be a time prior to the time when the statute of limitations runs.' ''

After the decision in the case of McEwan *vs.* Spokane, the Supreme Court of Washington reversed itself on the question of municipal liability in the case of German American Savings Bank *vs.* Spokane, 17 Wash., 315; 47 Pac., 1103. But the Supreme Court of Idaho has never passed on the question of tort liability, as will be shown herein, and therefore the present case should be decided in accordance with the weight of authority prevailing in the Federal courts.

City of Mankato *vs.* Barber Asphalt Co., 142 Fed., 329 (8th C. C. A.). A tort action for damages resulting from a breach of a paving contract. The Supreme Court of Minnesota had held the contract void. The Federal court held that the question was one relating to general principles of the law of contracts and to the

evidential value of facts, and determined that the contract was valid. It appeared that the rights of plaintiff arose before the determination of the Minnesota court, as was the fact in the instant case, and the Federal court held that plaintiff was not bound by the State judgment, even though it assisted in the defense.

In referring to the nature of the case the court said, pp. 334-5:

> "The present action, we think, does not sound in contract, but rather in tort. It is brought, not for the value of the property furnished or services rendered by the plaintiff to the city, but for failure of the city to perform its statutory duty to levy assessments. The complaint counts on a breach of that duty. There is no averment that defendant ever promised to pay the plaintiff for the work done and materials furnished by it. It could not lawfully do so and did not undertake to do so. The contract imposed no obligation upon the city to pay for the work done or for the materials furnished, except 'out of money lawfully raised by special assessments made upon real estate and property benefited by said improvements other than real estate and property belonging to said city of Mankato,' and the charter imposed the duty of making such assessments upon the officers of the city."

Again on p. 342, it was said:

> "It is not contended that there was any want of power in the city to make the contract. All prerequisite steps were taken to that end. The only questions are whether there were such

irregularities in the exercise of the power as to avoid the contract."

On the question of liability, the court said, p. 347:

"The State conferred power upon the city (see charter, Laws Minn., 1891, p. 417, c. 47) to make all necessary local improvements. It imposed a duty upon the city to make provision for payment for such improvements. It enacted, in language of command, that the expenses of such improvements 'shall be defrayed * * * by assessment upon the real estate benefited thereby or by an assessment upon the real estate fronting thereon, to be levied in the manner hereinafter prescribed.' It then prescribes that 'all assessments for local improvements aforesaid, as provided in this chapter, shall be made by the Board of Public Works,' etc. This suit against the city is for damages for failure to discharge this statutory duty. It is an action sounding in tort, one classified at common law as an action on the case.

"The elements creating liability and necessary to be stated in a declaration at common law would have been: (1) The circumstances creating the duty; (2) the duty; (3) and the breach of the duty, and nothing more. Such averments are all that the plaintiff in this case employs in its complaint, and they are held sufficient to constitute a meritorious cause of action (citing cases).

"By the wrongful act of the city in failing to make assessments against property owners, the Barber Company was deprived of any means of securing payment for its work. It had agreed by contract that its only resort should be to

> such assessments, and the city by accepting the charter from the State agreed with the State and with all parties interested, that it would perform its duty and make the assessments as required."

Following the foregoing quotation the court refers to and cites many of the authorities relied on by petitioner, including Denny *vs.* Spokane (*supra*).

Bates County, Mo., *vs.* Wills, 239 Fed., 785 (8th C. C. A.), was an action against Bates County, Mo., to recover on a contract for the excavation of a drainage ditch. The contract provided that payment should be made on engineer's estimates only. The defense was that no such estimates had been made. Plaintiff alleged that the engineer willfully withheld estimates. The county contended that it was relieved from liability because it had expended the money derived from the sale of bonds equal to the assessments levied on property in a drainage district. The court overruled the contention for the following reasons:

> "(1) Because the county is not prohibited from making, but is in our opinion empowered by the statutes of Missouri to make, the assessments necessary to pay for the ditch whether the funds derived from the sale of the issue of bonds have been exhausted or not (citing cases).
>
> "(2) Because the statutes of Missouri gave the county the absolute control of all the proceedings for the excavation of and the payment for the ditch, the levy and collection of the money to pay for it, imposed upon the county

the duty and invested it with plenary power lawfully to do all these things, so that if it has failed, or shall fail, to levy and collect from the property in the drainage district the requisite funds to pay for the ditch, that failure has resulted, or will result, not from a lack of authority or power in the county to do so, but from the failure of the county lawfully to exercise the power granted to it. Any municipal or *quasi* municipal corporation which has the corporate power to make and to perform a contract, which makes it and receives and keeps the benefits of its performance by the other party to it, is thereby estopped from defeating performance on its own part on the ground that it either negligently or fraudulently failed to exercise in a lawful manner the powers it had fully to perform its part of the agreement (citing cases).

"(3) Because if a municipal or *quasi* municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price of the improvements shall be paid to the contractor out of funds to be realized out of special assessments, or, out of the proceeds of bonds it has the power to issue, and the corporation has power to make the assessments or to issue the necessary bonds but fails to make sufficient valid assessments, or to issue sufficient bonds to provide the necessary funds to pay the contractor the contract price of his material and labor, or if it misappropriates such funds to other purposes, the corporation becomes primarily liable to pay the contract price itself (citing cases).

"In cases of this character the municipality or *quasi* municipality becomes primarily liable even when the contract expressly provides that the contractor shall accept the assessments in payment of the contract price and the municipality shall not be otherwise liable, whether the assessments are collected or not" (citing cases).

"This brief review of the grant of authority to the county discloses the fact that plenary power was given to it to make the contract for the construction of this ditch, to control, conduct, and determine every preliminary step which led up to the contract and which, if properly performed, made it valid and enabled the county to raise the funds to discharge all liability under it, to decide whether or not the improvement should be made, to decide what the true estimate of the cost of the location and construction of the ditch was, what the amounts of the damages to be paid and of the assessments to be made and collected should be, and what amount of bonds should be issued. If the county had made its estimate of the cost of the work sufficiently large, its assessments sufficiently high, or if it had sold a sufficient amount of bonds and had applied the proceeds, it could have lawfully obtained to the discharge of the contract here in suit, it would have had sufficient funds to pay its debt to the plaintiffs. The statute placed no limit upon the estimate of the cost of the improvement, and hence none upon the amount of bonds it could issue, none upon the amount of assessments it could levy and the duty and the responsibility to so estimate the cost, so fix the amount of the assessments, and so determine the amount of the bonds as to pro-

> vide the funds to pay its contractors the amount lawfully due them under the contract it made with them, rested upon it alone, and as the contractors were charged with no notice, duty, or responsibility in these regards, but had the unquestioned right to rely upon the contract the county had tendered to and made with them, and the county has received and kept the benefits of plaintiffs' performance of the contract, the county is estopped from defeating the plaintiffs' claim and judgment against it on the ground that it failed to take the legal steps which it had the power and which it was its duty to take to provide the funds to pay it. On this ground the county is liable generally for this claim, even if it now has no power to levy special assessments upon the property in the drainage district to pay it, and if a judgment is rendered against it at the next trial it should not be so limited as to be payable only from funds raised, or to be raised, by benefit assessments upon property in Drainage District No. 1, Bates County, Mo."

It is respectfully submitted that the lower court was mistaken when it said that the case at bar differs from the case just cited. The reference in the Bates County case to the statutory prohibition against a general levy is contained in the following quotation:

> "And if a municipal or quasi municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price thereof shall be paid to the contractor without any specification of the source from which it

> will derive its fund to do so, and there is no statutory prohibition of a general levy upon the property within its borders, the legal inference is that the grant of the power to make the contract also granted to it the power to levy, collect, and pay over to the contractor the funds necessary to pay the agreed price of the labor and material the contractor furnished."

While the judgment in the Bates County case was not to be limited to assessments raised, it was imposed because of the failure of the county to conduct the proceedings in such a way as to produce sufficient assessments. And it would be no greater hardship upon the property owners of the city of Nampa to pay for improvements constructed in Sewer District No. 22 than it would have been for the property owners of Bates County to pay for improvements constructed in Drainage District No. 1. Furthermore, a judgment against a public corporation in a tort action must necessarily be paid out of a general levy, and it is no defense to say there is no fund out of which such a judgment could be paid.

Oklahoma City *vs.* Orthwein, 258 Fed., 190 (8th C. C. A.), was an action brought by the owner of special improvement district bonds against Oklahoma City for "its willful neglect and refusal to perform a duty imposed upon it by law to create a fund necessary and essential under the obligations contained in the bonds, for the purpose of meeting the payment of the installments and interest due thereon." The Supreme Court of Oklahoma had previously held that

certain assessments against a railway company were invalid. Thereafter demand for a reassessment was made and refused, whereupon this action was commenced. The court stated the question to be decided as follows:

> "May the plaintiff recover in this action a general judgment against the city for the proportionate amount of the invalid assessments represented by all of the fourth count and a portion of the second and third?"
>
> "The law of Oklahoma, being Sessions Laws approved April 17, 1908 (Laws, 1907-8, c. 10), provided that the city itself should in no case be liable on these improvement bonds; therefore the plaintiff was remediless, unless a valid assessment of benefits should be made and collected. In our opinion, the evidence showed that the city was guilty of negligence and of a willful refusal to make valid assessments to pay the bonds of the plaintiff. The limitation of liability of the city above specified does not, in our opinion, exclude a remedy based upon negligence and willful refusal to perform this duty. Where a municipal or quasi municipal corporation, which has the power to make a contract for internal improvements, contracts for them and stipulates that the agreed price of the improvements shall be paid to the contractor out of funds to be realized out of special assessments, or out of the proceeds of bonds it has power to issue, and the corporation has power to make the assessments or to issue the necessary bonds, but fails to make sufficient valid assessments, or to issue sufficient bonds to pro-

> vide the necessary funds to pay the contractor the contract price of his material and labor, or if it misappropriates such funds to other purposes, the corporation becomes primarily liable to pay the contract price itself" (citing cases).

We call the Court's particular attention to the fact that the Oklahoma statute is almost identical with the Idaho statute on liability. Also we direct attention to a specific ruling on one of the assignments of error in the Oklahoma City case, as follows:

> "Eighth. It is our opinion that the contractor could have maintained this suit if he still owned the bonds, and, having sold them to the plaintiff, the latter can maintain it. The city owes the duty to levy the new assessment to the one who owns the bonds."

It has been said that the case of Pontiac *vs.* Talbot Paving Co., 94 Fed., 65 (7th C. C. A.), is opposed to the cases cited above. We respectfully submit that the Pontiac case can be distinguished from the case at bar on the ground that in the Pontiac case it was specifically held that plaintiff had a remedy by mandamus. The court said:

> "Whether the power subsisted in the city council to provide for a reassessment, notwithstanding the defect in the original ordinance, appears to have been the main subject of controversy in the trial court; and, for the purposes of the present inquiry, it is assumed that the decision there in favor of the power is not only in accord with justice, but is sustained as

> well by interpretations placed upon the statute by the Supreme Court. On that assumption the duty of the city is manifest to proceed promptly in the exercise of its power to assess and collect the unpaid amounts, and such duty can be enforced by mandamus, if remedies at law are not adequate for the adjustment of all rights. * * *
>
> "On the other hand, a complete remedy is clearly open to the contractor, by a proceeding in the proper forum, to ascertain the power, and thereupon enforce the ministerial duty to make the new assessment in obedience to the statute and violating none of its provisions."

In the instant case a remedy by way of mandamus is not open to the petitioner, as will be shown in the fourth subdivision of this brief.

The Pontiac case was based partly on prior Illinois decisions. The distinction which we have made here is recognized in the more recent Illinois case of Gray *vs.* City of Joliet, 122 N. E., 550, which was an action to recover for services rendered in making and spreading special assessments. The proceedings were finally abandoned, so no fund resulted out of which payment could be made. The court referred to previous decisions holding that there was no general liability where municipal officers neglected to collect assessments, but said:

> "In all those cases the assessment was actually levied and in some of them was actually collected."

After calling attention to the statutes compelling a contractor to look only to the fund for payment, and

providing that no claim would lie against the city, the court said:

> "These sections contemplated the assessment would be levied and collected, or, if for any reason it could not be collected, that a valid assessment would be made, and the person having a claim against the assessment was given his remedy by mandamus or injunction to enforce its collection."

II.

The Idaho Statutes and decisions do not prevent the relief sought in this case.

An examination of the statutes set forth in the appendix will show that the city had power and authority, in connection with special improvements, to create improvement districts, let contracts, issue bonds and assess and re-assess property for the cost of such improvements.

Respondent contends that petitioner is prevented from maintaining the present action because of the provisions of the Idaho Statutes, Sections 4150 and 4151 (appendix). The answer is that said sections are only intended to apply where valid enforceable assessments have been levied, and that they do not apply to the case at bar for the reason that valid enforceable assessments have not been levied. This point was emphasized in Barber Co. *vs.* Harrisburg, 64 Fed., 283, *supra.* It is conceded that after a legal assessment has been levied on property benefited, if the property owners do not pay their assessments or if for any reason the property assessed does not yield payment,

the bondholder is the one who has to suffer the consequences and he makes his investment with that possibility in view. However, a bond purchaser is entitled as a matter of right to have a valid enforceable assessment levied, and if through the failure, neglect or refusal of a municipality or its officers such an assessment is not made, then, under the authorities cited herein, the bondholder has his remedy in damages for the breach of duty.

The first paragraph of Section 4150 says that the bonds shall transfer to the owner the right of the city in the assessment and the lien thereof. It could not have been the legislative intent that ownership of the bonds would transfer to the owner a worthless thing, or that the right given the owner to sue for and collect every "such assessment" was a barren one.

The second and third paragraphs of Section 4150 also speak of "such assessments" in a way such as to indicate beyond the possibility of a doubt that valid, enforceable assessments were the only ones being considered in the adoption of the law. If this were not true, it would be necessary to impute to the legislature the absurdity of providing that the bondholder should have the right to collect an uncollectible assessment and to foreclose a lien where none existed.

Section 4151 says that the holder of a bond shall have no claim "therefor" against the municipal corporation in any event, except for the collection of the special assessment, and that the remedy for nonpayment shall be confined to the enforcement of "such assessment."

It is important to note that the bondholder does have a claim (by the exception) against the municipality "for the collection of the special assessment made." The remedy of enforcing "such assessment" is specifically provided. When there is no assessment to enforce, or when the municipality, through its own dereliction or mistake and without fault on the part of its bondholders, has denuded itself of the power to provide an enforceable assessment, a right to maintain an action such as this is the only alternative. The statutes then do not in any way prevent the maintenance of the present action.

There is nothing in the Idaho cases contrary to the decisions cited above.

Blackwell *vs.* Village of Coeur d'Alene, 13 Idaho, 357, 90 Pac., 353, was a case tried in the district court on an agreed state of facts, ten questions being submitted to the supreme court for determination. It appears that an assessment had been made and confirmed without protest or objection, under a law similar to the present law.

After holding that the assessments were liens on the property improved and referring to the bondholders' statutory remedies, the court said:

> "It is made clear by these provisions in the statute that the purchasers and holders of the bonds or warrants issued for the purpose designated in the act have two remedies for the collection of the principal and interest of these obligations: First, in case the village authorities should neglect or fail to pursue the usual and ordinary methods provided by the statute

> for the collection of the tax or assessment, the creditor may compel them to do so by procuring a writ of mandate against the proper officials. On the other hand, if they fail and neglect to discharge this duty, and the property owners become delinquent in the payment of their installments, he may proceed in the ordinary way to foreclose his lien through the district court in the same manner as he would foreclose any other mortgage or lien."

The distinction between the case mentioned above and the case at bar is that in the Coeur d'Alene case a valid, enforceable assessment had been levied as contemplated by law. In the present case no such assessment exists.

Furthermore, neither of the two remedies pointed out can be adopted by petitioner, for the State supreme court has invalidated the attempted re-assessment and enjoined any collection under it, thus precluding action against the property owners. In the Coeur d'Alene case no question of tort liability was before the court, and of course it did not undertake to pass on any question involving such liability.

In the case of Broad *vs.* City of Moscow, 15 Ida., 606, 99 Pac., 101, a contractor sued the city for damages for failure to pay or deliver bonds to him at the time and of the date of the completion of certain contracts which he had made with the sewer committee of the city. The contract provided specifically that the contractor should look to the special assessment fund for payment and that he should have no claim or lien against the city. In the statement of facts the follow-

ing language is repeated several times: "An assessment roll, as provided in said ordinance, was duly made and filed with the clerk of said city." And also the court said, "Thus it will be seen that respondent has paid the plaintiff in cash and bonds the full amount due him upon the several contracts referred to in this opinion." It was held that the city would not be liable, but it is apparent that the case was considered as one for a breach of contract rather than one of tort, and the decision is not authority for the proposition that a tort action, such as the present one, may not be maintained. As in the Coeur d'Alene case, it was held that plaintiff's remedy was in mandamus. The court reiterated the statement that plaintiff's remedy was against the officers to compel them to perform their duty. It was taken for granted that plaintiff had an appropriate remedy. So, again, that is the distinguishing feature between the Moscow case and the one now before this Court, for this petitioner, through no fault of his, has no other remedy if he fails in this action.

New First National Bank *vs.* City of Weiser, 30 Ida., 15, 166 Pac., 213, was an action in mandamus to compel the application of district improvement funds, first on interest and then on principal of outstanding bonds. As a lawful assessment had been levied, the case is in the same category as the other Idaho cases, in which tort liability was not considered. In the Weiser case the court said, at page 23:

> "It is not claimed in this proceeding that the city authorities have failed or neglected to make

> proper levies at the proper time, or that its officers have not in proper season certified to the tax collector the list of taxpayers against whom tax levies have been made on account of said bonded indebtedness and interest, and if all such assessments have not been paid, it is not the fault of the city but of the individuals who have let their taxes go delinquent."

We call attention to the implication in the last quoted paragraph. We believe it is fair to assume from the above language that if the authorities of the city of Weiser had failed or neglected to make proper levies at the proper time, or if they had not certified assessments in proper season, or if the city had been at fault, or if the bondholder had no remedy either against the taxpayer or the delinquent property, he would have been permitted to recover damages for breach of duty in a proper action.

III.

Respondent's officers were performing corporate functions in connection with the improvements specified herein, and respondent is liable for their acts and omissions.

Petitioner respectfully contends that the lower court erred in holding that the officers of respondent city were only instrumentalities in carrying out a special power, and that their acts and omissions would not be binding on the city. Section 4121 of the Idaho Statutes (appendix) provides that in addition to the powers heretofore granted, municipal corporations may con-

struct a sewer system and levy assessments to pay the expense of the same. Under Section 4124, the power and authority given by the chapter shall be exercised by the mayor and council, or chairman and board of trustees of the municipal corporation. Section 4144 provides that bonds may be issued in the name of the municipal corporation. Section 4150 states that the bonds shall transfer to the contractor or other owner or holder the right of (or) interest of the municipal corporation in or with respect to the assessment and the lien thereof.

We believe an examination of the Idaho statutes will convince the court that the Idaho Legislature in designating the mayor and city council intended that the governing body should act in its representative capacity for the city, and did not intend to relieve the municipality from any liability, which such governing body might incur in the exercise of its powers, and this would be particularly true in a case where a bondholder had lost his statutory remedy through the neglect of the designated agency.

Deferentially we disagree with the statement made by the court below that "it is uniformly held that in collecting money to pay for special improvements where there is no liability against the corporation, the corporation authorities do not act as its representatives, but as special agents or instrumentalities to accomplish a public end."

This identical point was specifically raised in the case of Oklahoma City *vs.* Orthwein, *supra*, concerning which point the court said:

> "Sixth. The claim that the power to pave is under the law and constitution of Oklahoma, given to the city officers, and not to the city, has no merit."

In exercising proprietary powers municipal officers are always agents or instrumentalities for certain purposes, but the courts have repeatedly held municipalities liable for torts of such officers.

Judge Dillon, in his work on Municipal Corporations, Section 827, page 1255, in summarizing the correct general principles to be deduced from the conflicting authorities, says:

> "(2) The officers of the city charged with the duty of making the assessment being primarily if not exclusively agents of the city for that purpose and not of the contractor, where the assessment has not been made or having been made proves to be invalid without any fault on the part of the contractor, and where through the act or neglect of these officers subsequently to the making of the contract the city is without power to make an assessment for the purpose of paying the contractor, a general liability attaches to the city to answer to the contractor for the resulting damages, the loss to the contractor therefrom being usually measured by the stipulated price."

At pages 1256-8 the learned author continues:

> "There are, as we think, just and sound reasons in many cases for not limiting the contractor to his remedy by mandamus to compel the levy and collection of the special assessment from the abutters, and for giving the contractor,

where the city is plainly in the wrong, a remedy *in personam* for damages against the city which made the contract and which either refuses, or persistently and purposely neglects, to make or to collect the assessment. Local improvements, such as grading or paving streets, making sewers, and the like, are public improvements for the benefit of the city or public at large and are not the private improvements of the abutter. The mode of payment by a local assessment on the abutter for benefits is an exercise of the State's power of taxation, and the proceeding as to him is in *invitum*. The city alone has the power to make the assessment and to collect it, and the duty to exercise this power and to make and collect the assessment is a duty resting upon the city, in the performance of which the contractor has a direct and immediate interest. It is an erroneous view that the city authorities in this matter are the agents of the contractors. They are agents, if agents at all, appointed by the law, and their failure to do their duty cannot be imputed to the contractor as a fault on his part. The city is, we repeat, under a *duty to the contractor*—the contractor is under no duty in this respect to the city, but has a right to have the city's duty faithfully performed. Time and time again has experience shown that when the contractor has completed his work the city finds it to be a disagreeable duty to enforce the assessments, and it either refuses or unreasonably neglects to do so. The abutters resist payment, and often succeed in defeating the assessment for want of power or of regularity on the part of the city. What right has the city to fold its hands and say to the contractor: 'We are not

liable in damages for neglect of duty; your only remedy is yourself to apply for a *mandamus* on the city to do its duty in making or collecting the assessment'? What right has the city to cast this expense and burden on the contractor? The city needs no mandamus if it wants to discharge its duty. The writ will not lie unless the city is in fault. It is a universal principal of law and justice, that the neglect of a plain duty of this kind is actionable in damages in favor of one who has an interest in the performance of such duty. The practical effect of applying this doctrine to cases like those under consideration is salutary. As long as no assessment is being enforced, the abutter and the general tax-payer, and too often the city council, are satisfied. But if the city is held to be liable in damages for a refusal to act or for negligence in the discharge of its duty, then it becomes a question between the general tax-payer and the abutter, and the general tax-payer will be interested to see that the burden shall fall on the abutter where the scheme of the improvement and the law have placed it. Too often the city's sense of justice can be reached only by a stimulus, such as an action for damages communicated through the nerve that leads directly to the city's treasury or the tax-payers' pocket. Moreover, if the city has to respond, it can reimburse itself by collecting the assessment, if the right to do so has not been lost by its own fault or neglect.

"In determining questions between the contractor who has performed his contract and has not been paid and the city which alone has the power to make and collect the assessment and is under a statutory and contract duty to exercise

the power and enforce the assessment, the courts ought to apply the principles so often declared that corporations equally with individuals should be held to a careful adherence to truth and good faith in their dealings with others, and cannot, by their representations, or silence, or neglect of duty, involve others in onerous engagements, and thus defeat the calculations and claims their own conduct has superinduced.

Zabriskie *vs.* Cleveland, C. & C. Railroad Co., 23 How. (U. S.), 381;

Bissell *vs.* Jeffersonville, 24 How. (U. S.), 287;

Montpelier National Life Ins. Co., *vs.* Huron Board of Education, 62 Fed., Rep. 778;

Hughes County *vs.* Livingston, 104 Fed. Rep., 306;

Hacket *vs.* Ottawa, 99 U. S., 86."

Even in cases where the contract or the statute stipulates that the contractor shall take all the risk and that the city shall be liable in any event, Judge Dillon says:

"Such stipulations or provisions might not, and unless so expressly stipulated, ought not, to include exemption from liability on the part of the city for negligent failure to discharge its duty to take the proper steps to levy and collect the assessments."

In 25 R. C. L., 88, cited by the Court below, the paragraph concludes as follows:

"It is sometimes stated that a city, in making improvements and levying special assessments

> to pay therefor, is the agent of the property owner. It is obvious that the agency is merely conventional and lacks nearly all of the elements of an ordinary agency. The authority does not emanate from the supposed principal. The work is not that of the supposed principal. He cannot discharge the supposed agent, nor direct the agent in the performance of the work. He pays for the work by an enforced, involuntary charge as he pays other taxes. It seems more exact to say that the council is the agent of the law, both in letting the contract and in levying the assessment."

The case cited to sustain the foregoing proposition is Malette *vs.* Spokane, 77 Wash., 205; 137 Pac., 496; Ann. Cas., 1915 D 225; 51 L. R. A. (N. S.), 686, wherein the court said:

> "It is true, also, that it is sometimes stated that the city, in making improvements and levying special assessments to pay therefor, is the agent of the property owner. 'These statements are, however, mere dicta, representing an analogy but not a principle. The municipality is the superior imposing a tax, not an agent binding a principal by contract. Whenever the question becomes a practical one, it is held that the public corporation or quasi corporation is not the agent.' 1 Page & Jones, Taxation by Assessment, Section 16, page 32. It is obvious that the agency is merely conventional and lacks nearly all of the elements of an ordinary agency. The authority does not emanate from the supposed principal. The work is not that of the supposed principal. He cannot discharge the supposed

> agent, nor direct the agent in the performance of the work. He pays for the work by an enforced, involuntary charge as he pays other taxes. 'While the general theory of assessments for benefits presents some points of resemblance to quasi contract, assessment is not a form of quasi contract other than as taxes generally are.' 1 Page & Jones, Taxation by Assessments, Section 18, page 35. It seems more exact to say that the council is the *agent of the law*, both in letting the contract and in levying the assessment. Hamilton, Special Assessments, p. 400; 1 Page & Jones, Taxation by Assessment, Section 19. As we have seen, the power to levy the special assessment is traceable solely to the taxing power of the state."

In the case of New Orleans *vs.* Warner, 175 U. S. 120, this Court said at page 129:

> "We adhere to the opinion pronounced by us when this case was first before this court, that the city in respect to this purchase acted voluntarily; that it was not, as had been held in the former case of Peake *vs.* New Orleans, 139 U. S. 342, with respect to other warrants, a compulsory trustee, but a voluntary contractor; that as the fund was to be partly created by the performance by the city of a statutory duty, it could not deliberately abandon that duty, or take active steps to prevent the further creation of the fund, and then plead a prior issue of bonds as a reason for evading liability upon the warrants. As the city had paid for the property in warrants drawn upon a particular fund, it was under an implied obligation to do whatever was

> reasonable and fair to make that fund good. Certainly it could not so act as to prevent the fund being made good, and then require the vendor to look to the fund and not to itself."

In Salt Lake City *vs.* Hollister, 118 U. S. 256, after referring to the authorities dealing with the liability of corporations for acts of their officers, the court stated:

> "It is said that Salt Lake City, being a municipal corporation, is not liable for tortious actions of its officers.
>
> "While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to this class of corporations than to corporations for pecuniary profit, we do not agree that they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the State or the public."

The authorities cited by the court of appeals belong in the category of State decisions holding against municipal liability. As we have maintained that heretofore the Federal courts have been practically unanimous in their views on the questions presented here, we have refrained from citing the numerous State decisions sustaining municipal liability.

Properly in this branch of the argument belongs what the District Court termed the "sinister aspect" of the case, the false and misleading certificate executed by the mayor, clerk and treasurer that there

was no litigation pending at the time of the delivery of the bonds, and that the city had received par for the bonds. (R. 26-28.) The facts were that litigation was pending, and the city had allowed a 10 per cent commission on the sale.

The representation was material and important because of Section 4137, Idaho Statutes, providing that the validity of the assessments could not be attacked after the expiration of thirty days from the date the assessments were confirmed. These particular assessments were confirmed January 10, 1921, therefore the statutory period for commencing suits expired February 9, 1921. The Lucas suit was commenced February 5, 1921. The bonds were delivered March 8, 1921.

Had it not been for the misrepresentation of fact, the examining attorneys would not have approved the validity of the bonds, and petitioner would not have made his purchase.

It has been argued that in executing the certificate the city officials were not acting within the scope of their authority, and that the city council did not authorize or have knowledge of the certificate? Section 4143 Idaho C. S. authorizes the issuance of bonds to the contractor, "or the mayor and council * * * or other officer or officers * * * thereto authorized by charter or ordinance, may sell the same." Ordinance No. 350 prescribed the form of bonds and Ordinance No. 351 authorized the issuance of the same, "and did ordain that said bonds, when executed, should be delivered to the lawful purchaser thereof." (R. 23.)

When the city council of Nampa directed the issu-

ance and delivery of bonds, beyond any question it intended that the administrative and ministerial officers of the city would do whatever was usual or customary in carrying out the directions given. It was reasonable to suppose that any purchaser would require, as an incident to delivery, a statement as to the organization of the city, the officers thereof, the number and amount of bonds issued and the price paid therefor, together with information as to litigation pending or threatened which might affect the bonds. It was also reasonable to suppose that such a statement would properly and lawfully be made by the officers having the information desired, and that the statement would be true.

In view of the circumstances, it seems most evident that the officers were acting within the scope of their authority when they executed the certificate in question, as an incident to the delivery of bonds in compliance with the order of the council. If they were acting within the scope of their authority the city is liable under the doctrine of respondeat superior.

In this connection it is petitioner's position that the fraud was merely incidental to the main cause of action, and that such cause exists irrespective of the fraud.

IV

Petitioner has no other remedy.

We have stated that unless petitioner can recover in the present action he will have no other remedy. The amended complaint shows that proceedings were taken in accordance with the statutes for the levy of addi-

tional or supplementary assessments, from the proceeds of which certain bonds, including those of the petitioner, might be paid. The section of the statute relating to re-assessments is number 4141. An examination of that section will show that re-assessments are authorized under two conditions, first, where for some failure of form the original assessment is invalid; and, second, where the original assessment is not sufficient to pay the cost.

The first provision of the section does not contemplate any additional assessment; it is intended merely to permit a reassessment in the same amount as the previous assessment which turns out to be invalid for any of the reasons stated. This case does not fall under that provision.

The second paragraph in Section 4141 is intended to permit additional or supplemental assessments "whenever, for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of sewerage improvement." It will be observed that the reassessment is authorized in this instance when the amount assessed shall not be sufficient. No doubt the respondent city thought it was justified in levying the reassessments in question because of the power extended by this part of the section, but the Supreme Court of the State of Idaho has taken a contrary view. In the amended complaint, Section VI (R., 18) it is alleged that Ordinance No. 345 declared the original assessments levied in District No. 22 were insufficient and that additional assessments were necessary. In Section VII (R., 21) it is alleged that Ordinance No.

351 declared "that through mistake and inadvertence the amounts assessed in the assessment roll, as approved and confirmed, were not sufficient to pay the cost of the sewerage improvements constructed in Local Sewerage Improvement District No. 22, thereby making it necessary for the city council to make a reassessment upon all of the property in said district to pay the cost of such improvements."

Ordinance No. 351 approved, ratified and confirmed the validity of all proceedings theretofore taken. These two ordinances were before the court in the case of Lucas *vs.* City of Nampa, *supra,* for in the court's opinion they are specifically referred to by number, and Ordinance No. 351 "was offered in evidence as Plaintiff's Exhibit I."

Referring to the matter of the reassessment, the Idaho Supreme Court said:

> "It is true that C. S., Sec. 4141, provides that in cases of special assessments in local sewerage improvements, where any such assessments have failed to be valid for want of form, or of sufficient formality or regularity, or conformance with the charter, ordinances or provisions of law governing such assessments, the city is authorized to reassess such special taxes and enforce their collection in accordance with the provisions of law existing at the time such reassessment is made. It is clear, however, that the reassessment, attempted to be made in the instant case, was not made for any reason assigned in the statute, nor was it made in conformity therewith."

From the quotation just made it appears that the Idaho court proceeded upon the theory that respondent city had attempted to make a reassessment under the first paragraph of Section 4141, that is, a reassessment where the original one had failed to be valid for want of form, etc., whereas the ordinances mentioned clearly show that the attempted reassessment involved in that suit was made in accordance with and under the authority of the second paragraph of Section 4141 because of the insufficiency of the first assessment. That no reassessment was attempted under the first paragraph of Section 4141 is clear from the decision in the Lucas case, for the court there recognizes the validity of the original issue of $118,300 and the assessments to pay them, and it does not appear that the assessments levied failed to be valid for want of form or for any other reason mentioned in said first paragraph.

It is difficult to understand what led the Supreme Court of Idaho to reach the conclusion announced but the inevitable result of such conclusion is that there can now be no reassessment on the property within District No. 22.

The amended complaint in this case shows that the Lucas case was pending from the 5th day of February, 1921, until the 25th day of June, 1925. During the period of that litigation, petitioner could not have maintained an action to compel the officers of the respondent city to perform the duties required by law, nor any action against the property owners in the district, for the reason that the right on which his demand would have been based was the subject of pend-

ing litigation. He cannot now maintain an action against the city to compel a reassessment because of the decision in the Lucas case, and he cannot maintain an action against the property owners to enforce a lien, for the Supreme Court of Idaho has said that there is no lien. Therefore, unless petitioner is permitted to maintain the present action, he is without a remedy at law or in equity.

In the court below it was suggested that petitioner might possibly have a remedy under Section 4133 of the Idaho Statutes. An examination of that section, however, will disclose that it, too, contemplates that a valid enforcible assessment has been made. It will be observed that the statute gives no lien until the expense or cost "shall be assessed." In the present case there is and can be no assessment, and hence no lien.

V.

The Idaho statutes of limitation do not bar the present action.

Respondent demurred to the amended complaint on the ground that the action was barred by the following sections of Idaho Compiled Statutes.

Section 6611:

> "Within three years:
>
> "4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Section 6617:

> "Actions for Other Relief.—An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Petitioner's contention is that his right of action in tort did not accrue until June 25, 1925, at which time the Supreme Court of Idaho affirmed the decision in the Lucas case. When petitioner purchased bonds he is presumed to have taken them with knowledge of his statutory and contractual rights. In effect he agreed to look for payment to the assessments levied and to rely upon the lien thereof for his security. He took the risk that the property owners might not pay their assessments, in which event he would have had to foreclose the lien. But under the authorities petitioner had the legal right to expect that valid enforceable assessments had been, or would be, levied. He was justified in relying on the presumption that the municipal officials would perform their duty in accordance with the statute.

However, Lucas and others brought their suit to enjoin the proceedings and to invalidate the assessments, alleging irregularities. They did not allege that defendant had no power to construct district sewer improvements and issue bonds therefor, but rested their case upon the contention that a prior estimate by the city engineer was essential and that no estimate in respect to the cost of the work to be paid for out of reassessments having been made in advance of the as-

sessments, the action of the council and the contract under it were alike illegal. Defendant contended that, as there was statutory authority for a reassessment when the first assessment proved insufficient, the action of the city was within the law, and it attempted to maintain its position in the State courts.

Not until June 25, 1925, was it finally determined that the respondent city had proceeded illegally in the attempted exercise of a power granted, and not until then did petitioner's cause of action in tort arise. Prior to that time the matter was in controversy, and no one knew or had any means of knowing what the ultimate decision would be.

If, before the final termination of the Lucas suit, petitioner had brought an action in mandamus to compel a levy, or if he had sought to foreclose the lien of the assessment made, an answer in either of such actions that the very existence of petitioner's cause of action was challenged in litigation pending would have suspended any possible judgment until that litigation was disposed of. Petitioner's rights were in abeyance during the pendency of the Lucas suit, and until it was finally terminated it would have been impossible for him to have known what his proper remedy would be.

There were three parties affected by the Lucas suit: the property owners, the city, and the bondholders. In that litigation the city sought to sustain the validity of the assessment out of which the bonds should have been paid, and it would have been manifestly unjust to penalize a bondholder for failing to sue the city in tort while it was taking steps calculated to sustain the

bondholders' contractual rights. The bondholders did not know that they had purchased worthless paper until the Supreme Court of Idaho had spoken in the Lucas case.

Subdivision 4 of Section 6611, Idaho Compiled Statutes, provides that a cause of action does not arise until the discovery of the fraud or mistake. Disregarding the element of fraud in this case and considering the element of mistake only, when can it be said that the mistake was discovered? Certainly the city did not believe that a mistake had been made at all, for it contested the Lucas suit and carried it to the Supreme Court. When the Supreme Court held in effect that a mistake had been made, the mistake was discovered in contemplation of law, and then, and not until then, did the cause of action in tort arise.

Petitioner contends that a fiduciary relationship existed between the city and its bondholders, and that the trust was not repudiated until after the decision in the Lucas case, when respondent refused payment of petitioner's claim. On this point the court held in New Orleans *vs.* Warner, 175 U. S., at page 130:

> "Having thus voluntarily assumed the obligations of a trustee with respect to this fund, it cannot now set up the statute of limitations against an obligation, which, as such trustee, it had undertaken and failed to perform. The rule is well settled that in actions by *cestuis qui trust* against an express trustee, the statute of limitations has no application, and no length of time is a bar. While that relation continues,

> and until a distinct repudiation of the trust by the trustee, the possession of one is the possession of the other, and there is no adverse relation between them."

The bonds in question do not become due until January 1, 1931. We contend that respondent's duty to petitioner is a continuing obligation extending to the time when the statutes of limitation have run, after the maturity of the bonds.

Petitioner's damages are resulting or consequential. If the Supreme Court of Idaho had reversed the lower court in the Lucas case petitioner would have had no tort action, but would have been relegated to his statutory remedies for the collection of his money.

The Supreme Court of Idaho, in Hillock *vs.* Idaho Title Company, 126 Pac., 612, has held that where an abstract company makes a false certificate and one is injured thereby, the cause of action accrues not when the certificate is made, but when the fraud or mistake is discovered.

The principle of law for which we contend is analogous to the principle that until a wrong has progressed to actual damage, the tort is incomplete and no action for it can be maintained.

> Aachen Insurance Co. *vs.* Morton, 156 Fed., 654.
>
> Smith *vs.* Seattle, 51 Pac., 1057.
>
> Wabash County *vs.* Pearson, 22 N. E. 134 (Ind.).
>
> 19 Am. and Eng. Enc. of Law (2d Ed.), 195.

In 37 C. J., 812, the principle is stated in the excep
tion to the general rule as follows:

> "The fact that the decision in a pending law
> suit may largely affect a claimant's rights doe
> not cause his right of action to accrue only
> upon the termination of such suit. His caus
> of action accrues independently of it, except
> when the pending suit is practically conclusive
> as to the nature and extent of his rights, o
> when his success therein is a prerequisite to his
> right to maintain his new action."

The following cases uphold the exception noted:

Hutchinson *vs.* Hutchinson, 92 Kan., 518; 141
Pac., 589.

U. S. *vs.* Wiley, 11 Wall., 508.

Klumpp *vs.* Thomas, 162 Fed., 853.

Shaw *vs.* Snohomish, 55 Wash., 271; 104 Pac.
272.

Snouffer *vs.* City of Tipton, 161 Ia., 223, 142
N. W., 97.

Eyerly *vs.* Board of Supervisors, 42 N. W., 374
(Ia.).

Grant *vs.* Township of Reno, 65 N. W., 376
(Mich.).

Section 6627, Idaho C. S., is as follows:

> "When the commencement of an action is
> stayed by injunction or statutory prohibition,
> the time of the continuance of the injunction or
> prohibition is not part of the time limited for
> the commencement of the action."

It is true there was no injunction against petitioner,
but the District Court of Canyon County had enjoined

the respondent city from collecting the reassessments it had previously made, and the pendency of that injunction would have rendered fruitless any action by petitioner.

There was a "statutory prohibition" which prevented the running of the limitation statute. Section 4151, Idaho C. S., *supra*, restricts the contractual right of bondholders such as petitioner to an enforcement of the assessments levied. Petitioner could only invoke his contingent right to sue in tort when it appeared that the remedy to which he was limited by statute was not available. Thus it may be said that the statute itself stayed the commencement of the present action.

Petitioner's cause of action could not have arisen until, by the decision of the Supreme Court of Idaho in the Lucas case, it was determined that the respondent city had proceeded negligently, irregularly, without the performance of the necessary preliminary acts, and that it was unable in law to do what it had unconditionally contracted to do, namely, provide a valid assessment with which to discharge its obligation to petitioner.

Respectfully submitted,

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APPENDIX.

Idaho Compiled Statutes, 1919.

Section 3939 provides: "Legislative powers generally. In addition to the powers hereinbefore granted under the provisions of this chapter, any municipal corporation may, by ordinance or by-laws, exercise the powers prescribed in the following sections, 3940 to 3973, inclusive."

Section 3942 provides that in addition to other powers granted, municipal corporations may "establish, lay out, alter, open any streets or alleys * * * construct * * * sewers thereon and repair and maintain the same; * * * and defray the costs and expenses of the same out of the general fund of such city or village, not exceeding 2 mills of the levy for general purposes, or defray the costs and expenses of the same by a special assessment in accordance with the provisions of sections 3944 and 3999 to 4028, inclusive."

Section 4121 provides that in addition to other powers granted, municipal corporations "* * * may by ordinances, by-laws, and under and by virtue of this chapter; construct, build or purchase, keep, conduct and maintain a sewer system or sewerage disposal works therein. * * *

"And for that purpose they may levy a special assessment on the lots and parcels of land fronting on any highway, street or alley that may be included within any of the sewer system, or sewerage disposal works, district or districts, as well as on all lots or parcels of land situated therein, except as hereinafter provided, to pay the expenses thereof."

Section 4122 is in part:

"Sewer Districts.—Such municipal corporation may establish sewer districts in conformity to the requirements of the topography of the grounds; and construct in each of said districts a main or trunk sewer; and such districts shall include real estate which can be conveniently sewered or drained in such main or trunk sewer, and which will be benefited thereby."

Section 4124:

"Authority vested in council or board.—The power and authority given by this chapter to construct and operate a sewer system and sewerage disposal works and levy a special assessment therefor and issue and dispose of special improvement bonds therefor shall be exercised by the mayor and council or chairman and board of trustees of the municipal corporation installing such improvements."

Section 4125 provides that the cost of improvements shall be assessed on property within the district.

"* * * each lot or parcel of land being separately assessed for the full debt (depth?) thereof in proportion to the benefits to the property to be benefited, sufficient to recover the total expense of such work, or the construction of such sewer and sewerage disposal works."

Section 4129. The ordinance of intention to create the district must state among other things,

"* * * the estimated cost of same, (sewerage system) that the costs of the same are to be assessed against all the property included within such sewerage district."

Section 4132 authorizes the enactment of an ordinance establishing the improvement district and providing for the payment of cost by special assessments. This section contains the following:

> "That the city council or trustees may expend from the general fund for such purposes such sums as in their judgment may be fair and equitable in consideration of the benefits accruing to the general public by reason of such sewerage improvement."

Section 4133:

> "Lien of assessments: Foreclosure.—Whenever any expense or cost of work shall be assessed on any land, lots or pieces or parcels of land the amount of said assessment or expenses shall become a lien upon said lands, lots or parcels of land, and shall take precedence of all other liens and may be foreclosed in accordance with the provisions of laws.
>
> "Any suit or suits may be in the name of the city or village of * * * (naming it), as plaintiff. And in such proceedings, where the court trying the case shall be satisfied that the work has been done or material furnished, which, according to the true intent of this chapter or any ordinance passed in connection therewith by such municipal corporation, would be properly chargeable upon the lots or lands thereby, or along such lots or lands, or that the same or any part thereof may be of benefit to or are within the boundary lines of such improved district, a recovery shall be permitted and a charge enforced to the extent of the proper proportion or value of the work or labor or material which would be chargeable upon

such lot or land notwithstanding any formalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers."

Sections 4134 and 4135 provide for the preparation of an assessment roll and for notice and hearing on objections to such roll.

Section 4136 authorizes the adoption of an order approving and confirming assessments and provides that the decision of a city council

> "Shall be a final determination of the regularity, validity, and correctness of said assessment to the amount thereof levied on each lot or parcel of land."

Section 4137:

> "Limitation on Contestability.—No suit to set aside the said special assessment or to enjoin the making of the same shall be brought or any objection to the validity thereof shall be allowed after the expiration of 30 days from the date the amount due on each lot or piece of ground liable for such assessment is ascertained or confirmed by the council or trustees."

Section 4140:

> "Collection of Assessments.—All such assessments shall be known as special assessments for sewerage improvements, and shall be levied and collected as separate taxes in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection subject to the same penalties in collection, and in the same manner as other municipal taxes."

Section 4141:

> "Reassessment.—In all cases of special assessments in local sewerage improvements or sewerage disposal works of any kind against any property, person or corporation whatsoever, where any such assessments have failed to be valid in whole or in part for want of form, or of sufficient informality or irregularity, or non-conformance with the charter, ordinances or provisions of law governing such assessments, the city council or trustees, or other authorized bodies or boards shall be, and they are hereby authorized to re-assess such special taxes or assessments and to enforce their collection in accordance with the provisions of law existing at the time the re-assessment was made.
>
> "Whenever, for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property, or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make re-assessment upon all the property in said local assessment district to pay for such improvements, such re-assessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy."

Section 4142 provides that the Mayor and Council

> "* * * may, in their discretion, provide for the payment of the costs and expenses of such improvement by bonds of the district."

Section 4143:

> "Disposal of Bonds: Maximum Issue.—Such bonds may be issued to the contractor constructing or building such sewer system or sewerage disposal works, or portion thereof, or other improvements connected therewith in payment thereof; or the mayor and council or the trustees of such municipal corporation, or other officers of such municipal corporation thereto authorized by charter or ordinance, may sell the same at not less than their par value, net, and pay the proceds to the contractor. Such bonds shall not be issued in excess of the contract price and expense of such work or improvement: Provided, however, that in determining the amount for which such bonds may be issued, the interest coupon thereunto attached shall not be included."

Section 4144:

> "Such bonds may be issued in the name of the municipal corporation in which such improvement is situated * * *."

The section prescribes the term, interest rate and signing of bonds, and concludes as follows:

> "Each bond shall provide that the principal sum thereon named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvement and not otherwise."

Section 4145 states that when bonds are issued the proper board or body,

> "* * * shall assess the cost and expense of such improvement against the lots and parcels of lands included within such improvement district,"

and provides that assessments may be paid in installments.

Section 4149 provides for the disposition of the assessments collected in the payment of principal and interest on bonds issued and among other things requires "that such bonds shall be collected in and paid in their numerical order."

Section 4150:

> "Bondholders' remedies. Such bonds, when issued to the contractor constructing said work or improvements in payment thereof, or when sold as above provided, shall transfer to the contractor or other owner or holder, the right of interest of such municipal corporation in or with respect to every assessment and the lien thereby created against the property of the owners assessed who shall not have availed themselves of this article in regard to the redemption of their property, as aforesaid, and shall authorize said contractor and his assigns and the owners and holders of said bonds to receive, sue for and collect every such assessment embraced in any such bond by or through any of the methods provided by law for the collection of the assessments for local improvements.
>
> "If the municipality shall fail, neglect or refuse to pay said bonds, or to properly collect any such assessments when due, the owner of any such bonds may proceed in his own name to

collect such assessments and foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, 5 per cent, together with the cost of such suit.

"Any number of holders of such bonds, for any single assessment or improvement, may join as plaintiff, and any number of owners of property on which the same are a lien may be joined as defendants in such suit. And such bonds shall be equal liens on the property as assessments represented by such bonds, without priority of one over the other to the extent of the several assessments to the several lots and parcels of land."

Section 4151:

"Same: Municipality not liable. The holder of any bond issued under the authority of this chapter shall have no claim therefor against the municipal corporation by which the same is issued in any event, except for the collection of the special assessment made, for the work of improvement for which said bond was issued, but his remedy, in case of nonpayment, shall be confined to the enforcement of such assessment. A copy of this subdivision shall be plainly written, printed or engraved upon the face of each bond so issued."

Section 3879, in Chapter 160, a part of the general law relating to cities of the second class, and enacted long prior to the enactment of the above special improvement law, is as follows:

"Duties of city engineer. The city engineer shall make estimates of the cost of all labor and

materials which may be done or furnished by contract with the city, and make all surveys, estimates and calculations necessary to be made for the establishment of grades, building of culverts, sewers, bridges, curbings and gutters and the improvement of streets and the erection and repair of buildings, and shall perform such other duties as the council may require. Before the city council shall make any contract for building bridges or sidewalks, or for any work on the streets, or for any other work or improvement, an estimate of the cost thereof shall be made by the city engineer and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate; and in advertising for bids for any such work the council shall cause the amount of such estimate to be published therewith."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 384

HOWARD MOORE, PETITIONER,

vs.

THE CITY OF NAMPA, A MUNICIPAL CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of the Case.

This action arises out of a decision of the Supreme Court of the State of Idaho in the case of Lucas vs. the City of Nampa 238 Pac. 288. After that case was decided this action was brought for the purpose of recovering against the city generally, upon the theory that the officials of said city had been negligent in their failure to provide lawful assessments, from which the principal and interest of plaintiff's bonds could be paid. The bonds affected by the Lucas case were those in excess of the original estimate of $118,300.00. A portion of the excess was necessary in order to pay a commission for the sale of the bonds and compensation to an engineer other than the City

engineer for the construction of the improvement. As to those items the decision of the Lucas case was to the effect that they were illegal and beyond the power of the city.

The city having no power to issue the bonds for the payment of these items the question is squarely presented whether or not the city can be held liable for the failure to do that which it had no power or lawful right to do. If without such power it was beyond the jurisdiction of the city and the question could be raised at any time.

Summary of Argument.

I

The decision of the Circuit Court of Appeals, is in conformity with the decisions of this and other circuits based upon similar conditions.

II

The Idaho Statutes and decisions of the Supreme Court do not grant the power to a City to bind itself generally for local improvements.

III

Respondents officers were not empowered to do more than represent the local district.

IV

Petitioners cause of action is barred under the Statutes of Idaho.

Argument.

Petitioner insists that the decision of the Circuit Court

of Appeals is in conflict with the decisions of this Court and the decisions in other circuits. We may assume from this statement and from the authorities he cites that he refers to the decisions in the case of Hitchcock vs. Galveston. 96 U. S. 341. District of Columbia vs. Lyons 161 U. S. 200, Barber Asphalt Paving Company vs. The City of Harrisburg, 64 Fed. 283, Barber Asphalt Paving Co. vs. City of Denver 72 Fed. 336, City of Mankato vs. Barber Asphalt Paving Company, 141 Fed. 349, Bates County, Missouri vs. Wills 239 Fed. 785, and Oklahoma City vs. Orthwein 258 Fed. 190.

We believe that each of the above cases may be readily distinguished from the case at bar and in so doing may be clearly shown as not conflicting with any decisions of this Court or any decisions of the other Circuit Courts. The trial court in its opinion (R Page 46) said in dealing with this particular phase of the question,

> "As construed in his written briefs, plaintiff's complaint alleges that his bonds are invalid and accordingly he argues that his only remedy is for a tort. Obviously, therefore, cases ex contractu are not in point. Nor can we regard as precedents tort cases where the plaintiff had valid bonds or other form of contract containing provisions, as here, for payment out of a special fund and the defendant having a duty to provide such fund wilfully or negligently defaulted in the discharge of such duty."

This statement clearly applies to the case in question cited by petitioner as authority for his position. The case of Barber Asphalt Paving Company vs Harrisburg, supra was decided on the theory that:

"At the date of the contract the defendant had the authority to pave its streets and pay for the same out of the treasury."

It preferred however to contract against this liability and attempted to do so by requiring that the improvements be paid for by special assessments, and having failed however to make valid assessments the court held the municipality liable on the ground and for the reason, that it had the right and power to make this contract and pay for the improvements out of its treasury irrespective of the special assessments. In the case at bar no such authority exists.

The same distinction may be made in the case of Barber Asphalt Paving Company vs. City of Denver Supra, since there the municipality had the power to make the contract it did make for the improvement, and to avoid liability, it merely stipulated against payment from the general treasury. In the case at bar the respondent was absolutely devoid of power to issue the bonds for the purpose for which they were issued.

In the case of City of Mankato vs. Barber Asphalt Paving Company, supra the Court said:

> "It is not contended that there was any want of power in the city to make the contract, all pre-requisite steps were taken to that end. The only questions are whether there were such irregularities in the exercise of the power as to avoid the contract. The suit against the city is for damages for failure to discharge this statutory duty."

In the case at bar, however, it is contended that there was an absolute and total lack of power on the part of the respondent to do that which it attempted to do and there can be no liability for a failure to do that which cannot be

legally done (Carpenter vs. City of Cohoes 81 N. Y. 21).

The case of Orthwein vs. Oklahoma City, Supra, is also clearly based upon the theory of a breach of contract which the municipality had the power to make and in which it stipulated against liability generally. In the case at bar, by the rule laid down in the Lucas case the respondent never possessed any power whatsoever to enter into a contract providing for a commission for the sale of the bonds and the employment of an engineer other than the regular city engineer. Irrespective of the fact that the original estimate included or did not include these charges since they were specifically declared illegal, bonds issued covering the same are void having been issued for an illegal purpose and without the authority or power of the municipality to issue the same.

In the case of District of Columbia vs. Lyons 161 U. S. 200 the work was done pursuant to a valid contract and the district received the benefit therefor, but the corporation and its successor, the District, failed to make the required assessments for the payment of the certificates involved, and it was held that the district was liable generally for its negligence in failing to make the proper levy within the prescribed time.

In the case of Bates County Misouri vs. Wills, supra, so strongly relied on by petitioner, it was held that the county was not prohibited from making the necessary assessments and the court said, beginning at page 789;

> "Because the county is not prohibited from making, but is in our opinion empowered by the statutes of Missouri to make, the assessments necessary to pay for the ditch whether the funds derived from the sale of the issue of bonds have been exhausted or not—

"Because if a municipal or quasi municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price of the improvements shall be paid to the contractor out of funds to be realized out of special assessments, or, out of the proceeds of bonds it has the power to issue, and the corporation has power to make the assessments or to issue the necessary bonds but fails to make sufficient valid assessments, or to issue sufficient bonds to provide the necessary funds to pay the contractor the contract price of his material and labor, or if it misappropriates such funds to other purposes, the corporation becomes primarily liable to pay the contract price itself. * * * * * * *

"And if a municipal or quasi municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price thereof shall be paid to the contractor without any specification of the source from which it will derive its fund to do so, and there is no statutory prohibition of a general levy upon the property within its borders, the legal inference is that the grant of the power to make the contract also granted to it the power to levy, collect and pay over to the contractor the funds necessary to pay the agreed price of the labor and material the contractor furnished."

The case last quoted from is practically a resume of all the authorities cited and quoted by the petitioner upon the right to hold the respondent liable for negligence, and it must be noted that the basis for the decisions in all of the cases is, that the municipality had the general power to bind itself for the payment of the construction of improvements in which such municipality had been held liable for negligence. In other words, all the cases and the decisions

of the courts have been to the effect that where the municipal corporation has the power to construct the improvements and levy a general tax for the payment of the same but contracts and stipulates against such general liability, on the theory that the property benefited alone, should be held for the payment of such improvements by a special tax to be assessed against the same and then fails to levy such tax, or for some reason such tax becomes invalid then the municipal corporation is held generally liable for negligence. We respectfully beg to disagree with counsel for petitioner in his endeavor to show that the statutes of Idaho authorize or empower the respondent to bind itself for the payment of a sewer improvement such as involved in this case. From Section 4132 cited and quoted on page 64 of petitioner's brief it appears that the city council or trustees may expend from the general fund what in their judgment may be fair and equitable to be paid by the general public in consideration of the benefits accruing to such general public by reason of the construction of the sewerage improvements. It will be readily seen that this section of the Idaho Compiled Statutes does not give to the council general power to construct a sewerage improvement at the cost and expense of the public generally. It is in fact a restriction and limitation upon the part of the council in paying out of the general fund more than which it can be reasonably said the general public is benefited.

We desire to point out that nowhere in the record is it claimed or alleged that the council has not fully and completely performed the governmental function of determining to what extent the general public has been benefited or that the amount so found has not been paid.

Section 3942 of the Idaho Compiled Statutes is also

cited in the appendix of the Petitioner's brief, apparently upon the assumption that such section grants to the municipality power to construct sewers and to defray the cost and expense of the same out of the general fund. But an examination of that statute discloses the fact that it is an enumeration of one of the general legislative powers of a municipality, and has to do only with the improvements of the streets generally, and refers to sewers constructed upon such streets and has nothing whatsoever to do with the construction of general sewerage improvement such as is involved here, and therefore this section of the statutes is not material in determining the matter before the court.

We have not attempted to go into the facts of all of the cases cited and quoted from by counsel for petitioner and to do so would unduly prolong the discussion upon this point. Suffice it to say, that all of the cases cited and quoted hold to the theory that where a municipality has power to bind itself generally for the construction of improvements but stipulates and contracts that it shall not be held liable generally, but that the contractor shall look wholly to the property benefited for his compensation for the improvements constructed by him, out of assessments to be levied against such property, and then fails and neglects to make such assessments the municipality may be held generally liable for its failure to do that which it had the power to do, and if it did not have the power to make such assessments but could make the improvements at the expense of the City the rule is that the municipality may then be held generally.

In the case of Lucas vs. the City of Nampa 238 Pac. 288, it was expressly held that the city did not have power to exceed the original estimate; that it was illegal and

void to include within any estimate compensation for the payment of any engineer other than the city engineer; that it was beyond the power of the City and that its attempt to pay a commission for the sale of the bonds, was illegal and void. We maintain that even though the city had included in its original estimate an amount sufficient to pay such items that never the less, any taxpayer could have questioned the right and power of the city so to do and when presented it would have been the duty of the court to hold that the attempt to pay such items was void. The defect of power was jurisdictional.

Lucas *vs.* City of Nampa, Supra.

The Respondent was not Acting in a Corporate Capacity.

It is contended that respondent's officers were performing corporate functions in connection with the improvements specified and that the city is generally liable for the failure of its officers to have an estimate filed which would cover the total cost and expense of the amount necessary to meet the full cost and expense of the improvements in Sewer District No. 22 including the cost and expense of an engineer's services, other than that of the city engineer, and, also the cost and expense of disposing of the bonds of the district in an amount sufficient to recompense the district in the sale of the bonds at less than par. In other words it is contended that if the city and its officers had adopted another procedure than that which it did, it would have been possible for the city to have paid not only an engineer's expenses based on 5% of the total cost of expense and improvement, but also a commission to be paid for the sale of the bonds in question.

We maintain that the officers of the city in performing the functions referred to them were performing functions of a special and limited jurisdiction and that under the statutes of Idaho the mayor and council were the mere agents of the district created under authority of law for the organization of the improvement District to carry out the purport of the statutes relative to the improvement contemplated. That in no wise did the mayor and council purport to act for the city or do anything that they had lawful power to do to in any manner bind the city as a whole. This distinction while it may at first blush seem to be close and more or less technical, yet there is that broad distinction, that regardless of the fact that in ordinary instances they represent the municipality generally, nevertheless in the construction of the improvements involved in this action they represent only the property included within the District.

In the case of Broad vs. Moscow 15 Ida. 606 99 Pac. 101 the question as to the authority and functions of the mayor and council in the construction of a sewer improvement was squarely before the court and the court said at page 624:

> "From the various provisions in this statute it would seem that the legislature intended to make the city a mere instrumentality for the collection and disbursement of the funds arising from the special assessments. Throughout the statute it clearly indicates that it was intended to create an indebtedness against the property alone and to limit all liens and claims to the property benefited by such improvement. The city or village is made the agent of the district to collect and apply the funds assessed to the discharge of the expense incurred in making such

improvement. The obligation is an obligation of property not an obligation of the city or municipality. The contractor and bondholder is limited to the property for the purpose of realizing the amount due such contractor and bondholder. The duties of the city in relation to the improvement and the fund to be collected from the property and the duty of the officers of such city clearly appears from the provisions of the act and if the city or the officers of the city, whose duty it is to act, neglect or fail to perform the duties imposed by this law then the remedy of the contractor or bondholder is against such officers for the purpose of compelling them to act, but the indebtedness cannot be taken away from the property benefited and fixed against the property generally of the city. If a general judgment could be obtained against the city then to the extent of such judgment there would be an increased debt above the expense of the improvement which the property must pay.

We think it clearly appears from the entire act that the legislature intended to inhibit the creation of any municipal indebtedness and to limit all claims for such improvements to the property affected.

It will be seen that the power and authority of the mayor and council to represent the property included within a sewerage improvement district has been determined by the Supreme Court of the State and limited to a particular and specific purpose, and the fact that the original statute vested this power and authority in a sewer committee can in no way change the power and authority of the mayor and council, when as a matter of law the powers vested in a sewer committee have been merely transferred to and vested in the mayor and council instead of such sewer committee. This matter having been squarely presented to the

Supreme Court of the State of Idaho and it having passed upon the question its decision on the point raised becomes binding on all courts.

6 Ruling Case Law, Constitutional Law Sec. 84.

The question decided by the circuit court is neither new nor novel for in following the decision of the Supreme Court of Idaho it was not without precedent and the case of Quill vs. Indianapolis 14 Ind. 292. 23 N. E. 788 & L. R. A. 681, not only bears out the theory of the law involved, but is based upon common-sense and reason. Since the decision in the case of Broad vs. Moscow the question of the power and authority of the mayor and council to represent the city generally has been presented to the Supreme Court of the State of Montana in the case of Gagnon vs. the City of Butte, 75 Montana 279, 243 Pac. 1085 and the court there had occasion to review this question and refer to the case of Broad vs. Moscow, 15 Idaho 606 99 Pac. 101. Among other things the court said:

> "Primarily the City of Butte incurred no personal liability to the contractor who did the work. It was merely constituted an instrumentality of the law in initiating and carrying out the improvements and in collecting the money due upon the assessments made by it against the property benefited in order to pay the obligations incurred in the execution of the work. Town of Windfall City vs. First National Bank 87 N. E. 985, 89 N. E. 311. 172 Ind. 679."

See also Peake *vs.* New Orleans 139 U. S. 342.

Lack of Another Remedy and Statute of Limitations

Petitioner attempts to make a point that he has no other

remedy by which he can be compensated for his investment unless the City can be held generally liable.

However, inasmuch, as petitioner has only related his conclusions as to the effect of the Idaho Statutes relative to his rights, which neither bear out nor confirm the conclusions reached, we pass this point without comment, and pass to the point raised relative to the Statute of Limitations.

And we desire to point out that if the petitioner had any cause of action at all it is based upon the theory that the respondent's officers were negligent in failing to levy sufficient valid assessments to meet the bonds in excess of $118,300.00, a portion which are held by petitioner. If the respondent failed or neglected to do anything within its power, such failure or neglect was entirely consummated prior to the delivery of the bonds in question to Sidle, Simons, Fels & Co., on March 8th, 1921.

The present action was commenced in the District Court on February 18th, 1926, nearly five years after the bonds in question were sold and delivered to the purchasers.

Section 6611, Idaho Compiled Statutes provides as follows:

> 'Within three years:
>
> 4. 'An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.'

Section 6617, Idaho Compiled Statutes provides:

> 'Actions for other relief. An action for relief not hereinbefore provided for must be commenced with-

in four years after the cause of action shall have accrued.'

Under either of the foregoing, petitioner's cause of action is barred unless it can be said that the Lucas case had the effect of tolling the statute but the trial Court in passing upon this phase of the case held that it did not, but the Circuit Court deemed it not to be necessary to pass upon the question at all.

The petitioner, however, having referred to it in his brief as of some importance, we take the opportunity and privilege of attempting to distinguish the facts in the present case from those in the cases cited by Counsel, and particularly to the case cited from the State of Idaho, Hillock vs. Idaho Title & Trust Co., 126 Pac. 612., in which it was pleaded that fraud had been practiced on the plaintiff and that such fraud had not, as a matter of fact, been discovered until a point of time within the statute.

The court held that such pleading was sufficient and that it was a question of fact as to whether or not the cause of action was barred.

In the present case there is nothing to show in the pleading that the petitioner did not have full and complete knowledge of the alleged negligence within the period of either or both of the foregoing statutes, and of the very time when such negligence was committed.

And, at best, if it may be said that the petitioner was mistaken at all as to the facts surrounding the execution and delivery of the bonds in question, it could only be a mistake relative to the power of the respondent to make valid assessments against the property within the local improvement district to pay the principal and interest on the bonds in excess of the original estimate.

We maintain, that the Lucas case did not take away from respondent any power that it had originally, and the case only decided points of law which the petitioner and everyone else was presumed to know.

It cannot be maintained that the petitioner did not know what the law was or that his cause of action should be postponed until the Supreme Court of Idaho, should hold as a matter of law, that respondent had exceeded its lawful power.

We therefore, respectfully submit that the Circuit Court of Appeals was correct in its decision; that the respondent is not liable generally for the reasons stated in the opinion of the Court; that any cause of action the petitioner might have had is barred, for the reasons stated by the trial Court (R-58); that the petition for writ of certiorari should be denied.

Respectfully Submitted,

D. L. RHODES,
LEON M. FISK,
Attorneys for Respondent,
Nampa, Idaho

SUPREME COURT OF THE UNITED STATES.

No. 384.—October Term, 1927.

Howard Moore, Petitioner
vs.
The City of Nampa.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 9, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner sued in the United States court for the district of Idaho to recover damages alleged to have been sustained by reason of respondent's negligence and false representations in respect of certain local improvement bonds. Respondent demurred to the complaint; the district court held that it failed to state a cause of action and dismissed the case. The Circuit Court of Appeals affirmed. 18 F. (2d) 860. The petition to this Court for a writ of certiorari stated that the decision below conflicts with the decisions of this Court and of the Circuit Courts of Appeals for the Third and Eighth Circuits.* The writ was granted. 275 U. S. —.

Respondent created a district for the construction of a sewer to be paid for by assessments against the lands therein according to resulting benefits. The statutes require the city engineer to make estimates of the cost of such improvements; provide that no contract shall be made for any work for a price in excess of the estimate, and direct the city council to pass an ordinance defining the boundaries of the district, describing the work and showing the estimated cost. Idaho C. S. 1919, §§ 3879 and 4129. The engineer's estimate was $118,300. Assessments were made for that amount; and, pursuant to ordinance adopted December 6, 1920, bonds for $117,000 were issued. The validity of these is

*Peake *v.* New Orleans, 139 U. S. 342. District of Columbia *v.* Lyon, 161 U. S. 200. Barber Asphalt Paving Co. *v.* City of Harrisburg, 64 Fed. 283. Barber Asphalt Paving Co. *v.* City of Denver, 72 Fed. 336. City of Mankato *v.* Barber Asphalt Paving Co., 142 Fed. 329. Bates County, Mo. *v.* Wills, 239 Fed. 785. Oklahoma City *v.* Orthwein, 258 Fed. 190.

not questioned. It was found that the estimate was too low, and an ordinance was passed stating that the assessments first made were not sufficient to pay the cost and expenses of the work. Additional assessments amounting to $49,500 were made; and, pursuant to ordinance of January 10, 1921, respondent executed and, on March 8, 1921, delivered to a purchaser additional bonds for $43,000. On that day the mayor, clerk and treasurer of respondent issued a certificate under its seal stating that no litigation was pending or threatened in respect of the creation of the district, the construction of the sewer or the issue of the bonds.

A transcript of the proceedings and that certificate were submitted to the attorneys, who are acting for petitioner in this case, for examination as to the validity of the bonds. And they, it is alleged, relying upon the recitals in the bonds and the statements in the certificate, gave a written opinion that the bonds were valid. The complaint alleges that on July 13, 1921, petitioner, relying upon such recitals, certificate and opinion, purchased three of these bonds. And petitioner says that the statement in the certificate was material because no suit to enjoin the making of special assessments or to set them aside may be brought after the expiration of thirty days from the making of the assessment. § 4137, C. S. 1919. The certificate was false. One Lucas, an owner of property in the district, had brought suit against the city and its officers to have the assessments in excess of the engineer's estimate declared illegal and to enjoin their collection. The trial court granted the relief sought; the Supreme Court held that the city was limited and bound by the original estimate and affirmed the judgment. 41 Idaho 35. Petitioner avers that under this decision his bonds are worthless.

He insists that respondent was negligent in failing to have a proper estimate and valid assessments made and in causing the false certificate to be issued, and that the damages claimed were caused by the negligence and misrepresentation. The suit is for tort. The demurrer was rightly sustained, unless the complaint shows that a breach by respondent of some duty it owed petitioner caused the damage claimed.

Each bond states that respondent acknowledges itself to be indebted and promises to pay bearer the sum stated; it contains recitals to the effect that all the things by law required in respect of the creation of the district, the construction of the sewer and

the issue of the bond in order to make it a valid obligation of the city have been done. It states that the total cost of the work has been assessed and that the assessments are liens upon the land; that provision has been made for, and the city guarantees, the collection of assessments sufficient to pay accruing interest and principal at maturity. But, as required by statute, each bond declares that the holder shall have no claim against the city except for the collection of the assessments; that his remedy in case of non-payment shall be confined to their enforcement, and that the interest and principal shall be payable out of that fund and not otherwise. The bonds are not negotiable. *United States Mortgage Co.* v. *Sperry*, 138 U. S. 313, 343. It is clear that respondent's faith or credit is not pledged and that the value of the bond depends upon the validity and worth of the assessments. The transcript furnished the examining attorneys showed that the engineer's estimate was too low and that the bonds in question were based on assessments in excess of that amount. Petitioner treats the transcript and false certificate as if furnished to him. He is charged, as of the time he bought the bonds, with notice of the invalidating facts and is held to have known the law. His position is not strengthened by the fact that respondent's officers, as well as the examining attorneys, were mistaken as to the validity of the additional assessments and subsequent proceedings. Recitals that merely reflect opinion as to the legal effect of the bonds or of the statements therein are not actionable and furnish no support for petitioner's claim.

The bonds were void, as held in the *Lucas* case, because issued upon assessments made in excess of the engineer's estimate. On the facts disclosed by the complaint, actionable negligence cannot be predicated on the failure of respondent's officers properly to exert their powers and perform their duties in respect of the estimate, assessment and contract for construction of the sewer. Such failure was not a breach of duty owed by respondent to petitioner. He had no relation to the matter until long after the bonds had been issued and sold to another. The facts showing their invalidity were disclosed by the transcript and known to the attorneys on whom he relied long before he purchased them. The complaint is not grounded on anything subsequently occurring.

It remains to be considered whether petitioner may recover by reason of the certificate issued March 8, 1921, falsely stating

that there was no suit in respect of the creation of the district, the construction of the sewer or the issue of the bonds. No law required or authorized the making of any certificate. The statutes do not contemplate any such statement. It is not a part of or material to the prescribed proceedings. The city council is the governing body of the city, but it did not make or authorize the statement. The officers who signed the certificate were not authorized to define the improvement district, make the assessment, issue or sell the bonds or to bind the respondent to pay for such improvements. It cannot reasonably be said that they are impliedly authorized to make any statement or give assurance in respect of such matters.

This action is not based on contract. Recovery is not claimed on the ground that respondent was empowered to pay for the work out of funds belonging to it or upon any promise that it would do so. As no actionable negligence or misrepresentation is shown, the lower courts rightly held that no cause of action is stated in the complaint. We find no conflict between the decision of the Circuit Court of Appeals in this case and the decisions referred to in the petition for this writ.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.